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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 218.

IROQUOIS TRANSPORTATION COMPANY, claimant of the Steamer Winnebago, etc.,
Plaintiff in Error,

vs.

DE LANEY FORGE AND IRON COMPANY,
Defendant in Error.

Error to the Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

This is a proceeding by the Delaney Forge & Iron Company, of Buffalo, New York, against the Steamer Winnebago, of Michigan City, Indiana, brought under Sec. 10,789, Compiled Laws of Michigan, 1897.

The Winnebago is a steel steamer of 1091 tons burthen and was built by the Columbia Iron Works at St. Clair, Michigan, for the Iroquois Transportation Company, a corporation organized under the laws of the State of Indiana. The contract for the construction of this steamer was made on March 8, 1902, between the Columbia Iron Works and John J. Boland and Thomas J. Prindiville, and by the lat-

ter assigned to the Iroquois Transportation Company April 5, 1902.

The construction of the vessel was begun in 1902, and the cash payments under the contract were as follows:

$7,500 at the date of signing the contract.
$7,500 April 3, 1902.
$4,000 April 15, 1902.
$4,000 June 15, 1902.
$4,000 Aug. 15, 1902.

And in addition to this, changing the terms of the contract, there was an additional $4,000 paid in October, 1902, and two negotiable notes of $4,000 each given, maturing respectively Nov. 1, 1903, and Nov. 1, 1904.

The steamer was launched March 21, 1903, but was not completed for delivery until July 19, 1903, at which time the Iroquois Transportation Company received a bill of sale of the steamer and delivered to the Columbia Iron Works 96 negotiable bonds of $500 each, secured by a mortgage on the steamer, and paid the balance of the cash payment, which was to be made on the completion of the vessel, and which then amounted to between $400 and $500, and in that way paid in full the purchase price of the steamer.

The contract is found on record page 143.

On the 18th of July, 1903, the steamer was inspected, measured and enrolled under the laws of the United States, and also licensed to be employed in domestic and foreign trade for one year from the date of enrollment. (Record, pages 140, 142.)

She left on the 19th of July for Lorain, Ohio, where she took on board a cargo of railroad iron.

At the time of her departure from St. Clair she had not been entirely completed and some of the workmen remained on board of her and returned with her to St. Clair; where she remanied for a day or two and where additional work was done upon her, and after that she was engaged in carrying cargoes between different points on Lake Erie and points on Lake Superior, having brought one cargo from Marquette, Michigan, and another from Lake Linden to ports on Lake Erie.

On the 30th day of July, or within eleven days after the steamer was delivered, the Columbia Iron Works made a common law assignment for the benefit of its creditors.

On the 25th day of August, the Delaney Forge & Iron Company served a notice on the Iroquois Transportation Company that it made a claim of lien against the steamer for forgings and material furnished, and in October following the present complaint was filed in the Circuit Court of Wayne County and process issued, the steamer attached and a bond given for her release by the Iroquois Transportation Company. About the same time, after notice, George W. Edwards and others filed an intervening complaint in the same court and in this also the Iroquois Transportation Company appeared, filed a bond for the release of the steamer and subsequently filed its answer in both cases.

A hearing was had before Judge Donovan without a jury, in the Circuit Court of Wayne County in May, 1904, and at this hearing the court found the issues for the plaintiff in both cases, entering judgment in the case of the Delaney Forge & Iron Company for $1,999.90, with interest from Aug. 1, 1903,

In the case of George W. Edwards, *et al.*, for the sum of $1,599.64, with interest from June 30, 1903.

From these judgments the Iroquois Transportation Company took an appeal to the Supreme Court of Michigan and there these decrees were affirmed, whereupon error was assigned and the cases removed to this court.

BRIEF.

I.

That the Steamer Winnebago was, at the time of her seizure, not used or intended to be used in navigating the waters and canals of this state.

Sauter v. *The Sea Witch,* 1st Cal., 162.
Tucker v. *Sacramento,* 1st Cal., 403.
Ray v. *Henry Harbeck,* 1st Cal., 451.
Haytien Republic, 65 Fed. Rep., 120.

II.

That the complainant cannot recover in this case because the appellant, at the time that it received notice of this claim, and at the time of the seizure of the steamer Winnebago in this suit, was a *bona fide* purchaser without notice of complainant's lien, and that complainant did not file in the proper court in the county in which it resided its claim for a lien within one year.

Sec. 8299, 45, Compiled Laws of Michigan.

III.

A proceeding under the statutes of Michigan against a vessel which has already been enrolled and licensed under the laws of the United States, and at the time of the seizure was actually engaged in interstate commerce, is unconstitutional and void because in conflict with the constitution and laws of the United States.

The Glide, 167 U. S., 606.
Johnson v. *Elevator Company*, 119 U. S., 397.
White's Bank v. *Smith*, 7 Wall., 646.
The Menominee, 36 Fed. Rep., 197.
Perry v. *Haynes*, 191 U. S., 17.
The Edith, Fed. Case 4283, 11 Blatch., 451.
The Edith, 94 U. S., 519.
Moir v. *The Dubuque*, Fed. Case 9696.
The Roanoke, 189 U. S., 185.

IV.

The material and supplies were not furnished on the credit of the vessel, but were contracted for, furnished and delivered to and on the credit of the Columbia Iron Works.

The Templar, 59 Fed. Rep., 203.
The Ferry Co. v. *Beers*, 20 How., 393.
The Underwriter, 109 Fed. Rep., 754.
Stephenson v. *Francis*, 31 Fed. Rep., 720.
The Westover, 76 Fed. Rep., 384.
The Abby Whitman, Fed. Case 15.
Drew v. *Hull of a New Ship*, Fed. Case 4078.
Van Pelt v. *Ohio*, Fed. Case 16870.

The Calisto, Fed. Case 2316.

Sewell v. *Hull of a New Ship,* Fed. Case 12682.

Van Cleve Glass Co. v. *Erratt,* 110 Mich. 689.

V.

The complainants have no lien enforcible under this act for any contracts made or material furnished after the vessel was launched on March 21, 1903.

Globe Iron Wks. v. *Steamer,* 100 Mich., 583.

Lake v. *Manhattan,* 46 Fed. Rep., 797.

Perry v. *Haynes,* 191 U. S., 7.

Tucker v. *Alexandroff,* 183 U. S., 424.

VI.

That the steamer Winnebago, engaged in interstate commerce, was not subject to seizure while passing from port to port through the waters within the jurisdiction of the courts of the State of Michigan.

Mich. C. R. Co. v. *Chicago M. L. S. Co.,* 1 Ill. App., 339.

Wall v. *Norfolk W. R. Co.,* 52 W. V., 485; 64 L. R. A., 501.

Connery v. *Quincy O. & K. C. R. Co.,* 99 N. W., 365; 64 L. R. A., 624.

VII.

The contract to build a ship is a maritime contract and therefore there is a lien for material and labor furnished which can be enforced in a court of admiralty, there being a lien under the state law.

People's Ferry Co. v. *Beers,* 20 How., 383.

Roach v. *Chapman,* 22 How., 129.

J. E. Rumbell, 148 U. S., 1.

Davis v. *New Brig,* Fed. Cas., 3643.

Read v. *Hull of a New Brig,* Fed. Cas., 11,609.

The Calisto, Fed. Cas., 2316.

The Hull of a New Ship, Fed. Cas., 6859.

Van Pelt v. *The Ohio,* Fed. Cas., 16,870.

The Abbie Whitman, Fed. Cas., 15.

Sewall v. *The Hull of a New Ship,* Fed. Cas., 12,682.

Purington v. *The Hull of a New Ship,* Fed. Cas., 11,478.

The Richard Busteed, Fed. Cas., 11,764.

Drew v. *The Hull of a New Ship,* Fed. Cas., 4078.

The Chas. Mears, Fed. Cas., 10,766.

N. J. Steam Nav. Co. v. *Merchants' Bank,* 6 How., 378.

Benedict's Admiralty (2 Ed.), Sec. 264.

De Lovio v. *Boit,* 2 Gall., 475.

Insurance Co. v. *Dunham,* 78 U. S. (11 Wall.), 10.

Parsons on Shipping and Admiralty, Vol. 2, p. 327.

Dupont De Nemours v. *Vance,* 19 How., 162.

The Grape Shot, 9 Wall., 129.

The Guy, 9 Wall., 758.

The Lulu, 10 Wall., 192.

The General Custer, 10 Wall., 204.

The Patapsco, 13 Wall., 329.

The Robert Parsons, 191 U. S., 17.

The Blackheath, 195 U. S., 361.

The Magnolia, 20 How., 296-307.

Tucker v. *Alexandroff*, 183 U. S., 424.
Globe Iron Wks. v. *Steamer*, 100 Mich., 583.
The Eliza Ladd, Fed Cas., 4364.

BRIEF AND ARGUMENT.

This is a proceeding instituted in the Circuit Court of Wayne County, Michigan, by the Delaney Forge and Iron Company against the Steamer Winnebago *in rem*, under the Water Craft Act of Michigan.

The act under which this proceeding is brought is found in 3 Compiled Laws of Michigan, page 3254, and is as follows:

> "(10789) Sec. 2. Every water craft of above five tons burthen, used or intended to be used, in navigating the waters of this state, shall be subject to a lien thereon:
>
> "First, for all debts contracted by the owner or part owner, master, clerk, agent or steward of such craft, on account of supplies and provisions furnished for the use of said water craft, on account of work done or services rendered, on board of such craft, by seamen, or any employe, other than the master thereof; on account of work done or services rendered, by any person, in or about the loading or unloading of said water craft; on account of work done or materials furnished, by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing or equipping such craft: Provided, that when labor shall be performed or materials furnished as aforesaid, by a sub-contractor, or workman, other than an original contractor, and the same is not paid for, said person or persons may give the owner or his agent, or the master or clerk of said craft, timely no-

tice of his or their said claim, and from thenceforth said person or persons, shall have a lien upon said craft, *pro rata*, for his or their said claims, to the amount that may be due by said owner, to said original contractor, for work or labor then done on said water craft."

I.

THAT THE STEAMER WINNEBAGO WAS, AT THE TIME OF HER CONSTRUCTION AND SEIZURE NOT USED OR INTENDED TO BE USED IN NAVIGATING THE WATERS OR CANALS OF THIS STATE.

That the steamer was not built for or intended to be used in navigating the waters of the State of Michigan exclusively, is practically conceded. She was built for the general lake trade and during the time she was actively sailing had carried cargoes between ports in the states of Ohio and New York and ports on Lake Superior in the states of Michigan, Minnesota and Province of Ontario. The fact that while navigating between these ports she at times passed through waters which were within the boundaries of the State of Michigan, did not alter the fact that she was not intended for or used in navigating exclusively within the waters of the State of Michigan.

A vessel intended for the New York and China trade did not come within the acts of the legislature of the state of California, which provided a lien upon vessels navigating the *waters of this state.*

Sauter v. *Sea Witch,* 1 Cal., 162.
Tucker v. *Sacramento,* 1 Cal., 403.
Ray v. *Henry Harbeck,* 1 Cal., 451.

The laws of Oregon restrict liens upon boats to those navigating the waters of the state or construct-

ed in the state. It was held that this law did not apply to vessels engaged in navigation between the ports of Oregon and foreign ports.

The Haytien Republic, 64 Fed. Rep., 120.

The appellees will doubtless cite the case of *Canfield* v. *The Brig,* 27 Mich., 479, in which it is held that the act is not confined to water craft used or intended to be used exclusively in navigating the waters of the state, and that the brig in question was in this particular case strictly within the terms of the act.

The court in that case so held because at the time of the collision between the brig and the booms and logs which she damaged, she was as a matter of fact navigating the waters of the State of Michigan. The Winnebago, however, when some of the liens arose was on the land and not navigating at all. She was within the state, but not navigating its waters. The case in the 27th Mich. is therefore not in point and should not be a controlling authority in the light of the decision in Oregon and California, and the later decisions of the Supreme Court in which it has been held that the water craft acts of the different states must be most strictly construed and, that their provisions cannot be extended by implication to cases which are not within the plain import of the language of the acts.

II.

THAT THE COMPLAINANT CANNOT RECOVER IN THIS CASE BECAUSE THE APPELLANT, AT THE TIME IT RECEIVED NOTICE OF THE COMPLAINANT'S CLAIM, AND AT THE TIME OF THE SEIZURE OF THE STEAMER WINNEBAGO IN THIS SUIT, WAS A BONA FIDE PURCHASER WITHOUT NOTICE OF COMPLAINANT'S LIEN, AND THAT COMPLAINANT DID NOT WITHIN A YEAR FILE IN THE PROPER COURT IN THE COUNTY IN WHICH IT RESIDED, ITS CLAIM FOR A LIEN.

It is conceded that the complainant is a corporation organized under the laws of New York, and that its residence is Buffalo, New York. There is no proof that it has any residence, temporarily, or otherwise, in the State of Michigan. The complaint in this case was filed in the Michigan Wayne County Circuit Court. It was therefore not filed in the proper court in the *county in which the complainant resided.* The section of the statute under which we make this defense is as follows:

> 8279.—45—"Liens may be enforced under this act at any time within six years from their origin: *Provided,* that no lien shall be enforced against a water-craft in the hands of a *bona fide* purchaser without notice unless a complaint to enforce the same shall have been filed in the proper court, in the county where the party claiming the lien resides, within one year from the time the same accrued."

The court under the evidence must find that the Iroquois Transportation Company was not the owner and in possession of the Winnebago during the time the liens sought to be enforced here accrued, and that it did not become such owner until the 18th day of July, 1903, when it received its bill of sale, then it is established beyond all doubt

the steamer was when this suit was brought in the hands of the Iroquois Transportation Company, an innocent purchaser for value. It was for the complainant to show affirmatively *that the appellant was not a bona fide purchaser without notice,* or if it was, that a complaint to enforce this lien had been filed within one year, *in the county where the complainent resided.* (Rec., 70, 71, 72.)

This was not done.

The appellant when its answer came in alleged that it was a *bona fide* purchaser without notice.

This answer was filed in November, 1903, and the liens had accrued between December, 1902, and July, 1903.

The complainant knew then, if it did not before, that the appellant was a *bona fide* purchaser without notice, and if complainant chose to, it still had time to bring itself within the provisions of Section 45 if it could do so at all.

The complainant, however, not residing in any county in this state, *could not bring itself* within the terms of this statute. To file a complaint in the courts in Erie County, New York, to enforce its lien under a statute of Michigan, could not be done, as the watercraft lien laws of the different states are not enforceable in any other state except in admiralty in a proper case.

Section 3 provides that the complainant may file a complaint with the clerk of the Circuit Court of any county.

It is only in cases in which the rights of a *bona fide* purchaser without notice come in, *that the complaint must be filed in the county where the person claining the lien resides.*

Within one year after the lien accrues if a vessel subject to a lien under this act goes into the hands of such a purchaser the complaint must be filed in the particular county in which the person claiming the lien resides, and it cannot be filed elsewhere.

Therefore, when it appears that the vessel when seized was in the hands of such a purchaser, and it also appears that the complaint was not filed in the proper county, the court loses jurisdiction and the complaint must be dismissed. It is therefore only necessary to plead the fact that there was a *bona fide* purchaser without notice to give the claimant the benefit of this statute, and the complainant the notice, so that he can reply by amended complaint, or cure the deficiency by filing his complaint in the proper county.

The legislature, in adding this provision to the act, doubtless intended that the law was made solely for the protection of the citizens of Michigan, and it is not difficult for such citizens to protect themselves by filing their claims in the court of the county in which they reside, and all such citizens could therefore preserve their lien, no matter how long after filing the complaint they might be, in obtaining process and a seizure under it. The filing of the complaint in the proper court preserved the lien for an indefinite period against a *bona fide* purchaser, and one year was allowed for this purpose.

As the complainant in this case does not reside in Michigan its lien was only valid *so long as the rights of an innocent bona fide purchaser did not intervene.* It could protect itself by making a seizure before such a contingency arose, or by giving such notice as would make it impossible for a person to

purchase the vessel without notice of its lien. In this case it is conceded that no notice whatever was given of the existence of the lien until more than a month after the Iroquois Transportation Company had paid the full price for the steamer and taken her away from St. Clair. Had the complainant given the notice before the 18th day of July, which it might have done, as the master of the Winnebago had been around her and subsequently on board of her from December until the day she left, and her engineer had been employed on her from March until July, the case would have been different. So well satisfied, however, was the complainant with the standing and credit of the Columbia Iron Works that it took no steps whatever to protect itself by giving notice of any claim of lien that it might have on the steamer.

This watercraft act, being in derogation of the common law (which provides for no such lien), must be strictly construed and the complainant, before it can recover, must bring itself clearly within the terms of the act. This it has not done and could not do, as the act was not intended to protect the lien of any foreign creditor the moment the rights of an innocent purchaser intervened. Under a proper construction of the act the complainant cannot recover, and this, under the peculiar circumstances of this case, is no hardship, because, even though it had not been paid for the material it furnished, the appellant had clearly paid the Columbia Iron Works for all it received, and if this lien is held to be valid would have to pay twice for so much as was put into this ship by the complainant.

The equities are with the appellant. The com-

plainant could have protected itself by giving the information of the existence of the lien, as the appellant did not know, and could not have known that the complainant would claim a lien upon the vessel. There is nothing to indicate that such a claim would be made, but, on the contrary, there was every indication that all of the material had either been paid for, or the payment of the same so secured that no lien would or could be claimed upon this steamer.

Had the appellant inquired, it would have learned from the statement of the complainant sent to the Columbia Iron Works on July 1st, that the indebtedness to it was very small, amounting to less than the material which it had furnished to the Steamer Howard, which was then still in the ship yard in an unfinished state. The complainant had given credit on its books for the $5,000 note which it received, just as the Columbia Iron Works had charged the account of the complainant with the amount of this note, and there cannot be the slightest doubt in the minds of any one regarding the testimony explaining these accounts, that it was given, accepted, intended and considered as payment of the account at least up to the time that the note was presented for payment.

The equities therefore are stronger with the appellant, and the court ought not to be quick to ask it to pay a second time for what it has once paid for.

III.

A PROCEEDING UNDER THE STATUTES OF MICHIGAN AGAINST A VESSEL WHICH HAS ALREADY BEEN ENROLLED AND LICENSED UNDER THE LAWS OF THE UNITED STATES, AND AT THE TIME OF THE SEIZURE WAS ACTUALLY ENGAGED IN INTERSTATE COMMERCE, IS UNCONSTITUTIONAL AND VOID BECAUSE IN CONFLICT WITH THE CONSTITUTION AND LAWS OF THE UNITED STATES.

In this case the Winnebago was launhced March 21, 1903. She then became a vessel subject to admiralty jurisdiction. (*Tucker* v. *Alexandroff*, 183 U. S., 424, in which this court held that a vessel becomes such as soon as she is launched.) On July 18th, she was enrolled and licensed under the laws of the United States, and from the 19th day of July, 1903, was actually engaged in interestate commerce between the ports of different places on the Great Lakes.

While so navigating all those serving on board of her in any useful capacity; all those furnishing supplies, such as fuel and provisions; and all those who rendered towage and salvage services to her, or furnished material and supplies for her repair or equipment, had liens under the maritime law, in all cases except when supplies were furnished at Michigan City, Indiana, and even these liens, and any other liens that might accrue at the home port (if, under the laws of Indiana there was a lien), could be enforced in the courts of admiralty of the United States.

To seize the vessel and subject her to sale, and the proceeds of the sale to distribution in the state court, would be in direct conflict with proceedings in admiralty under the laws of the United States, and

would trench upon the exclusive jurisdiction of the federal courts.

In the case of the *Glide,* 167 U. S., 606; 17 S. C., 930, Mr. Justice Gray, in deciding the case, says, referring to proceedings under Water Craft Acts of the states, page 943:

> "Such actions may also be maintained *in personam* against a defendant in the common law courts, as the common law gives; all in consistence with the grants of admiralty powers in the ninth section of the judiciary act. But it could not have been the intention of congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the federal courts would be defeated."

On the same page, in speaking of a *dicta* of Mr. Justice Clifford, pronounced in 7 Wall., 624, and repeated in *Leon* v. *Galceran,* 11 Wall., 185, 192, and in *Norton* v. *Switzer,* 93 U. S., 355, 365, stated as follows:

> "Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement."

Mr. Justice Gray says:

> "If understood, as contended by defendants in error, to imply that the states may authorize

> such liens to be enforced in their own courts by proceedings in the nature of admiralty process *in rem*, it is unsupported by the decisions there referred to, or by any other decisions of this court, and is inconsistent with several recent opinions of this court in which the subject was fully considered."

The learned justice, referring to the decision by Justice Blatchford in the case of *Johnson* v. *Elevator Company*, 119 U. S., 397, refers to their language on page 935 as follows:

> "Liens, under state statutes, enforcible by attachments in suits *in personam*, are of every day occurrence, and may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the constitution of the United States."

In this latter case the proceeding was *in personam* under the Illinois statute, and the attachment was ancillary and, the court held, was an incident of a common law remedy and in a case in which the admiralty courts had no jurisdiction.

In the case at bar the proceeding is under a watercraft act which follows, as near as may be, the proceeding *in rem* and in admiralty.

In examining the further provisions of the statute we find that Section 8261 provides for a hearing "*as in admiralty* in cases of general average, salvage, collision and seamen's wages."

Section 8263 provides for judgment against the craft, ordering it to be sold at public vendue by the sheriff on ten days' notice.

Section 8265 provides that the sheriff, after the sale, shall deliver to the purchaser a bill of sale,

and that the proceeds of the vessel be paid to the clerk of the court.

Section 8266 provides that the enrollment under the laws of the United States shall be recited in the bill of sale, and that this will show the regularity of the sale, and that

> "it shall be as effectual to pass the title of such water craft free and clear of all liens existing, before such sale under this act, or any previous law of this state, and all liens asserted, or which might have been asserted prior to sale to the purchaser, as fully as if made by the owner immediately before the sale, and shall also vest in such purchaser an indefeasible title as against all chattel mortgages, or other incumbrances created by the owner, as well as against the owner himself and such liens as aforesaid."

Section 8267 provides for the distribution of the proceeds as follows:

1st: Costs in all cases filed prior to sale and on which judgment has been entered, or may be within twenty days thereafter, rendered for complainant.

2nd: Salvage.

3rd: Seamen's wages.

4th: All claims filed prior to sale on which judgment may have been, or may, within twenty days thereafter, be rendered in favor of complainant.

Section 8268 provides that any surplus proceeds are to be distributed as follows:

1st: Costs in all decrees on claims filed after sale.

2nd: All other liens enforcible under this act.

3rd: All claims or mortgages or other incumbrances.

4th: The owner.

The provisions of this statute are in conflict with the constitution and laws of the United States, particularly in the sale of the vessel under the decree of the court without regard to the rights of such persons, as may have maritime liens upon her. The title purports to be a perfect title regardless of the maritime liens.

It also distributes the proceeds without regard to the paramount rights of maritime lien bolders, and this distribution is strictly in conflict in many particulars with the distribution of the proceeds of a vessel in a court of admiralty.

In courts of admiralty there is no distinction made between decrees prior to the sale and decrees after the sale. Liens are paid according to their priorities, regardless of the time when the libel to enforce the same is filed.

This statute, when only enforced against vessels which have not yet been launched, or in some cases enrolled and licensed, would not necessarily conflict with proceedings in admiralty, because no maritime lien could arise upon such a vessel, and the craft might not be within the jurisdiction of an admiralty court.

The distinction lies in the fact that at the time of the seizure this vessel had been enrolled and licensed and engaged in navigation, and therefore had become a thing of commerce within the jurisdiction of the federal courts.

See

White's Bank v. *Smith,* 7 Wall., 646.

The case of the *Menominee,* 36 Fed. Rep., 197, holds that the lien law of Minnesota, so far as it

provides a proceeding *in rem,* is unconstitutional.

In the most recent utterances of the Supreme Court on this question in *Perry* v. *Haynes,* 191 U. S., 17; 24 Sup. Ct. Rep., 8, the court held that an act of the State of New York which provides a proceeding *in rem* to enforce a lien for repairs furnished a canal boat engaged in navigation on the Erie Canal, is unconstitutional. They say:

> "A statute providing that a vessel may be sued and made defendant without a proceeding against the owners, or even mentioning their names, partakes of all the essential features of an admiralty proceeding *in rem,* of which exclusive jurisdiction is given to the District Courts of the United States."

The court then goes on to compare the New York statute with the admiralty proceeding and finds that the statute, which in many respects is similar to the Michigan statute, is unconstitutional, because it is a proceeding *in rem* against the vessel by name without a direct proceeding against the owner.

Whatever may be said upon the subject of the right of a state to legislate and provide for a lien upon a vessel for the cost of its construction, and to further provide such methods of enforcement as the legislature may deem necessary, it does not dispose of the question that when once the craft which has been constructed, and upon which the parties furnishing the lumber and material have a lien while she was being constructed, becomes a vessel, a thing of commerce between states, it becomes subject to the laws of the United States, and these liens cannot be enforced against it in a direct proceeding *in rem,* because such a proceeding, when

sought to be enforced against a vessel which is subject to the jurisdiction of the admiralty court, creates the same conflict that would be created had the cause of the lien arisen after the vessel was enrolled and licensed. It is the interference with the jurisdiction of the admiralty court over a vessel when she becomes such, and subject to admiralty jurisdiction, that is obnoxious.

If the lien can be enforced in any other manner than by a direct proceeding *in rem,* as by a suit *in personam,* with a right of attachment as an incident to that suit, then the proceeding is one which can be permitted, as was the case in *Johnson* v. *The Elevator Company, supra.* But in no case has it been said that a proceeding *in rem,* as followed in admiralty, can be brought against an enrolled and licensed vessel in any state court.

In the case of the *Edith,* Fed. Cas 4283, 11 Blatch., 451, the court, on page 315, say:

> "But it may well be doubted that the Supreme Court or Mr. Justice Clifford meant to be understood to hold that a state may annex to a maritime contract, *or even to any contract relating to a ship,* a lien which shall operate to withdraw her in any degree from the operation and effect of the law maritime, by which courts of admiralty are governed, and which, by the constitution, they are authorized and are bound to administer, or which shall hinder or prevent courts of admiralty from dealing with the ship in all respects according to the principles of the admiralty law. Can the states, by their statutes, create liens which shall interfere with or disturb the priorities given by the law maritime? If they can, then power to maintain and administer the jurisdiction and laws of the ad-

miralty has not been conferred upon the government of the United States and its courts. For illustration, suppose a case of collision, and a suit against the ship to recover therefor, in the admiralty. Can the state create liens, upon which any party may intervene by cross libel, or otherwise, and assert a priority over the maritime lien, and take, as the case may be, the whole value of the vessel?"

In this case the Supreme Court (*Edith*, 94 U. S., 519), in passing upon the New York statute, said:

> "It matters not that the statutory provisions for enforcing the lien have been adjudged invalid, because beyond the power of the state legislature. If they are invalid it may be doubted whether all the provisions purporting to give a lien are not also invalid because inseparable from the prescribed means of enforcing it. But, without deciding that, we may remark that clearly the state had power to enact that the lien it created should terminate if a bond was given in place of the vessel; and the creditor claiming the lien must take it, subject to the conditions imposed."

In the case of the *Menominee*, 36 Fed. Rep., 197, Judge Shiras holds that the statute of Minnesota which creates a lien is valid, although the proceeding to enforce the lien in a state court is invalid.

If, in this case, the procedure for enforcing the lien is invalid and unconstitutional, then the libelant must resort to some other remedy, and it may well be said that the whole statute must fail and fall because the lien created is inseparably connected with the manner of enforcing it.

In the case of *Moir* v. *The Dubuque*, Fed. Case 9696, Judge Longyear, of the District Court for

the Eastern District of Michigan, held that this statute of Michigan is a proceeding *in rem* and, therefor, contrary to the Act of 1789.

It is contended that the case of *Knapp-Stout & Co.* v. *McCaffrey,* 177 U. S., 638, is an authority in favor of the proposition that where the contract, which is the subject of the lien, is not maritime, the states are privileged to create liens and enforce them by proceedings *in rem.*

This authority does not go so far as to hold that such proceedings *in rem* may follow strictly the practice and procedure in courts of admiralty, nor does it hold that a vessel which is engaged in interstate commerce under the laws of the United States can be reached by a process *in rem* such as is used in the admiralty courts, even though the contract is not maritime. Such a proceeding would trench upon the maritime laws of the United States, and be an interference with the proceedings of the federal courts in admiralty in that it would provide for a different classification and enforcement of liens. It would have to provide for an enforcement and sale which would be in conflict with such liens, and would therefore be as repugnant to the laws of the United States as if the contract had been maritime.

In the case of the *Roanoke,* 189 U. S., 185, the court, in pasing upon a statute of the State of Washington, says:

> "Not only is the statute in question obnoxious to the general maritime law in declaring every contractor and sub-contractor the agent of the owner, but it establishes a new order of priority in the payment of liens, abol-

ishes the ancient and equitable rule regarding stale claims and permits the assertion of a lien at any time within three years, regardless of the fact that the vessel may have been sold to a *bona fide* purchaser. * * * It also gives, or at least creates the presumption of a lien, though the material be furnished upon the order of the owner in person. * * * While no case involving this precise question seems to have arisen in this court, we have several times had occasion to hold that where congress has dealt with a subject within its exclusive power; or where such exclusive power is given to the federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for the states to invade that domain of legislation and enact laws which in any way trench upon the power of the federal government. Cases arising in other branches of the law furnish apt analogies.

"The principle is stated in a nutshell by Chief Justice Marshall in *Sturges* v. *Crowinshield*, 4 Wheat., 122, 193; 4 L. Ed., 529, 548: 'But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. * * * That whenever the term in which a power is granted to congress, or the nature of the power required that it should be exercised exclusively by congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act on it.' This was said of a bankrupt law of New York which assumed to discharge the debtor from all liability for debts previously contracted, notwithstanding the constitution had vested the power in congress of establishing uniform laws on the subject of bankruptcy."

The court then proceeds to refer to a number of

cases in which the laws of different states are held to be unconstitutional because they sought to legislate upon subjects which would interfere with the rights of citizens derived under the constitution and laws of the United States.

In this case the Winnebago, at the time the complaint was filed, had been in commission for several months; actually engaged in carrying cargoes between ports in the State of Ohio and Ontario, Canada, between places in Minnesota and ports in New York, and during that time was in a position to, and doubtless had created many claims which, under the maritime law, were liens upon her.

She hailed from a port and belonged to a corporation resident of the State of Indiana. Had she been sold under process in this case the state court would have given to her purchaser a clear and unincumbered title, and would then have distributed the proceeds of sale according to the provisions of the statute and not according to the priorities established in the courts of admiralty.

This would be very much akin to the case of *Sturges* v. *Crowninshield, supra,* in which the statute of the State of New York discharged the debtor from all liability for debts previously contracted, notwithstanding the constitution had vested the power in congress of establishing uniform laws on the subject of bankruptcy.

In this case under this statute, the sale by the sheriff discharges the vessel of all previous liens, which is conceded to be solely the province of a court of admiralty; as much so as if there had been an act of congress establishing that right.

The act, so far as it provides for the enforcement

of the lien, is clearly inconsistent with the maritime law of the United States and the proceedings in admiralty under it. In the case of *Perry* v. *Haynes, supra,* the court held that the law creating the lien was valid, but so much of it as provided for its enforcement by a proceeding *in rem* was invalid.

In this case so long as the vessel did not become the subject of admiralty jurisdiction the state undoubtedly had a right to create a lien upon her and enforce it, but the moment she became subject to the admiralty jurisdiction such a lien could not be enforced by a proceeding *in rem* as in this case.

IV.

THE MATERIAL AND SUPPLIES WERE NOT FURNISHED ON THE CREDIT OF THE VESSEL, BUT WERE CONTRACTED FOR, FURNISHED AND DELIVERED TO AND ON THE CREDIT OF THE COLUMBIA IRON WORKS.

In this case the contract for the material that was used was made with the Columbia Iron Works and not with the owners of the Winnebago. The material was charged on the books of the complainant to the Columbia Iron Works. The goods were billed and sent to the Columbia Iron Works. There was no notice given to the Iroquois Transportation Company, or to anyone connected with the vessel, that the latter would be looked to as security, or that a lien would be claimed upon her, and from time to time. Beginning with December, monthly statements of account were sent on the first day of each month to the Columbia Iron Works. On June 23rd a promissory note of $5,000 due in 60 days, signed by the Columbia Iron Works, was sent to and accepted by the complainant and credit for this amount

was given on account of the Columbia Iron Works, and the succeeding statement of account, sent on July 1st, showed the account to be less by $5,000 than it was on the month previous. The first notice that was given by the complainant to anyone that it would claim a lien was 26 days after the Columbia Iron Works had made an assignment to its creditors. Then for the first time the complainant gave notice that it claimed a lien under the state law. It is a well settled rule in admiralty that if credit be given to an individual a lien upon the vessel is waived.

In the case of the *Templar,* 59 Fed. Rep., 203, Judge Morrow held that liens under the state statute were subject to the same limitations and enforced by the same rules of procedure, and are subject to the same propositions that would arise in cases of lien under the maritime law.

Ferry Co. v. *Beers,* 20 How., 393.

In this case it was held that the liens on vessels encumber commerce, and are, therefore, discouraged.

The Underwriter, 109 Fed. Rep., 754.

In *Stephenson* v. *Francis,* 21 Fed. Rep., 720, the courts say that secret liens are not favored by the courts.

In the same case it was held that when an owner of a vessel orders repairs, the presumption is that they were furnished upon his credit and not upon the credit of the ship.

A charge upon the books against the vessel is

not conclusive evidence of the intention to create a lien.

In the case of the *Westover*, 76 Fed. Rep., 384, Judge Seaman, quoting from the case of the *Columbia*, 67 Fed. Rep., 555, says:

> "The material inquiry is not whether the libelant himself may have contemplated a claim of lien, but whether a lien was created by or resulted from the mutual understanding of the parties and the services rendered in pursuance thereof."

Much valuable information on the construction of the water craft statutes can be gained from the early decisions in the admiralty courts of this country at a time when they assumed jurisdiction in cases relating to the building of a ship.

The Abbie Whitman, Fed. Case 15 (1854). Sprague, J., Massachusetts. Building a ship. Held credit was given the owner, as all the charges were to the builder, without reference to any vessel. Materials were taken to the yard and no effort made to ascertain for what they were to be used, or in what vessel. Payments were not credited on the separate accounts.

Drew v. *Hull of a New Ship*, Fed. Case 4078. Lumber furnished for building a ship. Massachusets, Sprague, J. (1860). Citing *Rogers* v. *Currier*, 13 Gray, 129. Held that the lumber was not furnished for any specific ship.

Van Pelt v. *The Ohio*, Fed. Case 16,870, New York (1850). Timber furnished to builders of ship. Judson, J., holds that under the laws of New York it should appear that at the time the materials were

furnished it was not upon the personal credit, but upon the credit of a particular ship. It must also appear from all the surrounding circumstances.

The Calisto, Fed. Case 2316 (1840), Ware, J. Services for work on a vessel while being built. Lien being on a domestic vessel must be determined by laws of Maine "Furnished for and on account, etc.," by virtue of a * * * parol agreement. Says: "The statute does not create a lien for labor and materials upon the simple and naked fact that they have been actually employed in the building of the vessel; the lien arises only when the materials and labor are furnished by virtue of a previous agreement." Affirmed by Story, J., in *Read* v. *Hull of a New Ship,* Fed. Case 11,609.

Sewall v. *Hull of a New Ship,* Fed. Case 12,682, 1 Ware, 565 (1855). Ware, J., Maine. Libel for material used in building a ship. Notes given. Defense made by mortgagee. When contract for lumber was made it was known that H. & Co. were engaged in building this ship; that the lumber was such as was ordinarily used in building vessels, and that he had good reasons for believing that it was intended to be used in this vessel. Nothing said on the subject on either side. Does not appear how libelant charged items. Books not produced. The presumption was, therefore, that they would show that they were charged in the usual way. It was conceded that the materials were actually used in building the vessel. "There must be a reference or appropriation, express or implied, to the thing against which the lien is claimed. There is no proof that at any time before H. & Co. suspended libelant ever looked to the ship for security. On the contrary, on set-

tlement a negotiable note was given for the amount due. Nothing was then said by either party about a lien on the vessel. It cannot therefore be said to have been furnished 'for or on account of this ship.'" The court concludes:

> "In order to maintain a lien there must be an appropriation of the material, express or implied, that at the time of the contract, or if not then, at least at the time of the delivery of them and the executior of the contract to the particular vessel against which the lien is claimed."

Some light on this subject may be derived from an examination of the decisions under the mechanic's lien laws of the different states.

In order to constitute a lien under the statute, the material must be furnished on the credit of the building and not on the credit of the owner or other contracting party.

Duncan Bros. v. *Aaron,* 6 Houston (Del.), 566.

Hills v. *Elliott,* 16 Serg. Rawle (Pa.), 56.

Eufala Water Co. v. *Addyston P. & S. Co.,* 89 Ala., 552.

It must also be furnished with the distinct understanding and intention that it is to be used in the particular building or vessel upon which the lien is sought to be enforced.

Cook v. *Rome Brick Co.,* 98 Ala., 409.

Weaver v. *Sells,* 10 Kas., 609.

Holmes v. *Richet,* 56 Cal., 307.

Choteau v. *Thompson,* 2 Ohio St., 114.

Lanier v. *Bell,* 81 N. C., 337.

Mills v. *Terry Mfg. Co.,* 91 Tenn., 469.

The case of the *Eufala Water Company* v. *Addyston, etc., supra,* was a lien against property under which water pipes had been laid, and, in his opinion, McClellan, J., used the following language:

> "The proposition that a lien attaches only where the materials have been furnished for the purposes to which they are devoted, and that it does not arise when they have been supplied on the general credit of the purchaser and without reference to any contract, express or implied, for their use on a particular building or for the improvement of certain land, cannot be denied."

The same jurist, in the case of *Rome Brick Company, supra,* said:

> "It (the contract) must have had reference to the particular building, to the erection of which the materials were devoted, and which is no doubt to be subject to the payment of the price thereof, and not merely to a house which the contractors were building in a named city."

In this case the building upon which the lien was sought to be enforced was in the city named in the contract.

The Kansas and Michigan statutes are almost identical, and in the case of *Weaver* v. *Sells, supra,* Ballentine, J., in denying a lien claim, said:

> "In order for the vendor to obtain a lien * * * he should sell and furnish it (the material) with the intention and understanding that it should be used in constructing the building against which he claims a lien."

California also has a statute similar to the Michigan statute, and in that state Chief Justice Mor-

rison, in the case of *Holmes* v. *Richet, supra,* said that:

> "To entitle a material man to enforce a lien upon a building for materials furnished it must be alleged and proved that not only have the materials been used on the construction of the building, but they must have been, by the express terms of the contract, furnished for the particular building upon which the lien is claimed."

Citing *Houghton* v. *Blake,* 5 Cal., 240.

The case of *Mills* v. *Terry Mfg. Co., supra,* declares the law of Tennessee to be that the seller of materials to a contractor is not entitled to a lien upon the property repaired or constructed therewith where there is no special contract between the dealer and the owner of the property that such material should be used in construction or repairs of the particular property.

In the case of *Hills* v. *Elliott, supra,* the following language is used:

> "The material must be furnished on the credit of a particular house; such must be the understanding at the time. The charges must be made in such a manner that the owner, if he applies to the materialman before he pays the architect, may be able to discover the liability of his house. The law fixes the lien on the sale and delivery of the goods for a particular house."

In this case the court draws parallels in this way:

> "A lumber merchant purchases on credit 100,000 feet of boards to sell and make a profit. He changes his intentions and erects two or three houses and uses half of the boards therein. If his creditor for this lumber has a lien on those

houses he has what neither himself nor the buyer nor, as I believe, the legislature ever intended.

"A storekeeper purchased in Philadelphia, in the usual course of his business, glass, locks, etc. He erects a house or houses. The merchant was not intended to have a lien on those houses for the price of so much of those articles as may be used."

The law of Ohio, as announced in the case of *Choteau* v. *Thompson, supra,* is as follows:

"If a materialman sells his wares with no understanding as to their application he can assert no lien upon the building or vessel in which they may be placed. It is only where the materials are furnished for a purpose named in the act that a lien is acquired."

Under the statutes of Idaho when materials are sold under a general sale, without any reference as to what use or where they are to be used, there is no lien.

Columbia Iron Works v. *Richenberg,* 43 Pac., 681.

In Illinois it is held that a mechanic's lien does not exist for lumber furnished upon an open account without reference to its being placed in a particular building.

Hill et al. v. *Bishop et al.,* 25 Ill., 349.

Dymond v. *Bruhns,* 101 Ill. App., 425.

New York:

There can be no lien unless the seller and purchaser both understand that at the time of the delivery of the material they were to be used in a particular building.

Watrous v. *Elmendorf,* 55 How. Prac. Rep., 461.

Ohio:

In the case of *Choteau* v. *Thompson,* 2 Ohio St., 114, the court holds that if material be furnished without a contract if it shall be put to a particular use of erecting a craft or building no lien on the building or vessel exists.

California:

It is not sufficient to show that materials were sold to be used on the property. It must be shown that they were actually used there.

Sylvester v. *Cal. Quartz Mining Co.,* 80 Cal., 510; 22 Pac., 217.

Missouri:

There is no lien for materials which did not enter into the construction.

Fitzpatrick v. *Thomas,* 61 Mo., 515.

Connecticut:

To the same effect is *Chapin* v. *Persee & B. P. W.,* 30 Conn., 461.

Nebraska:

Weir v. *Barnes,* 38 Neb., 875.

Vermont:

Hinckley E. I. Co. v. *Janus,* 51 Vt., 240.

In Michigan there can be no lien unless the seller understood that the property sold was to be used in a particular building, and the same was made with that understanding.

VanCleve Glass Co. v. *Erratt,* 110 Mich., 689.

V.

THE COMPLAINANTS HAVE NO LIEN ENFORCIBLE UNDER THIS ACT FOR ANY CONTRACT MADE OR MATERIAL FURNISHED AFTER THE VESSEL WAS LAUNCHED ON MARCH 21ST, 1903.

The complainants, the Delaney Forge Company, have furnished a bill of particulars (Rec., 7), in which is set out the various shipments of forgings made to the Columbia Iron Works. The last four items being subsequent to February 28th, and amounting to the aggregate of $184.27, are admittedly furnished after March 21, 1903, when the steamer was launched, and became a vessel subject to the admiralty jurisdiction. She was afloat in navigable water, being in the St. Clair River at St. Clair, and was in a condition so that she could have been completed by anyone. These items clearly were for things furnished after that time, and therefore are not a lien which can be enforced by process in the state court under the decisions hereinafter referred to.

In the case of *Edwards et al.* it appears (Rec., 176) that on April 2nd, or at least after the items amounting to $1,385 were furnished, there was in all furnished to the Columbia Iron Works items amounting to $214.65 (Rec., 176, 177). These items were all furnished after the vessel was launched and when she was in the water, afloat and in process of completion, and for these there can be no lien enforceable by this proceeding under the decisions of this court.

In the case of the *Globe Iron Works* v. *Steamer,* 100 Mich., 583, the court, on page 590, says:

> "After the vessel is launched, contracts for equipment or repairs or material are maritime. Before the vessel is launched, they are contracts upon land and are non-maritime. The distinction is so clearly pointed out in the numerous authorities above cited, and the rule so firmly established, that we deem further discussion unimportant. (*Lake* v. *The Manhattan,* 46 Fed. Rep., 797.)"

It seems almost unnecessary to add any argument to what Judge Grant has said in the foregoing case. The Winnebago at the time she was launched had then been named, was afloat, and though she had not on board any of her machinery, was *in esse,* had become a thing of commerce, and could have been removed from this place to any other place, and put to various uses in the lines of transportation. It was not necessary to make a propeller of her. She could have been converted into a tow barge, a side wheel steamer or a transport of any kind, with or without steam propulsion.

Tucker v. *Alexandreff,* 183 U. S., 424, is directly in point and seems conclusive that after a vessel is launched she comes within the jurisdiction of the navigation laws and a subject for maritime liens and torts which can be enforced in a court of admiralty. On page 427 the court say:

> "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches

> the water she is transformed and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name."

We contend in this case that there was no evidence to show that any items except 1 steel coupler shaft, 1 steel outboard shaft, 1 rudder frame, 1 steel thrust shaft, were on board the steamer at the time she was launched. A large part of these forgings were for the engines of the steamer. These were being built upon land in the yards of the Columbia Iron Works, and were not placed on board of the steamer until after she was launched, and we contend that a lien only attaches after the material is placed on board, and it not appearing that this material had been placed on board. As to all such items there can be no remedy under this statute, because the lien could be enforced in admiralty.

In the case of *Edwards et al.* there is no proof that the two items of steam capstans were placed aboard of the Winnebago before she was launched. In fact the letter on p. 134, Record, shows that it arrived at St. Clair on the 24th of March, three days after the Winnebago was launched. In fact, from the whole testimony it is to be inferred that these windlasses were placed on board after she was launched and therefore these items cannot be recovered for. See

Perry v. *Haynes,* 191 U. S., 17.

VI.

THE STEAMER WINNEBAGO, ENGAGED IN INTERSTATE COMMERCE, WAS NOT SUBJECT TO SEIZURE WHILE PASSING FROM PORT TO PORT THROUGH THE WATERS WITHIN THE JURISDICTION OF THE COURTS OF THE STATE OF MICHIGAN.

The evidence shows that the steamer Winnebago was a steel vessel 200 feet long, 39 feet wide, of more than 1,000 tons burthen, and was built for the general lake trade in which she has since been engaged.

The evidence clearly shows that at the time of her seizure the Winnebago was engaged in interstate commerce.

She was carrying cargoes destined to other states than Michigan. This state was at most only one terminus of her voyage in the cases when she discharged her cargo of coal at Lake Linden, or took on a cargo of ore at Marquette bound to Tonawanda, New York. She was engaged in such commerce as brought her under the commercial clause of the Constitution.

The Daniel Ball, 10 Wall., 557.
The Montello, 20 Wall., 430.

The process in this case ran against the Winnebago *in rem,* and the sheriff of Wayne County was commanded to seize her. It was not an attachment of property as an incident or part of a (???) She was at the time engaged in interstate commerce and had on board a cargo destined for a foreign state. This was in transit. It has been held that loaded cars of a foreign railroad cannot be seized under a writ of attachment out of a state court.

It was held that this was an interference with in-

terstate commerce under the Constitution and laws of the United States.

Mich. C. R. Co. v. *Chicago M. L. S. Co.*, 1 Ill. App., 339.

Wall v. *Norfolk & W. R. Co.*, 52 W. Va., 485; 44 S. E., 294, and also in 64 L. R. A., 501, together with an elaborate note on the subject.

Connery v. *Quincy O. & K. C. R. Co.* (Minn.), 64 L. R. A., 624; 99 N. W., 365.

These authorities apply to the Winnebago with greater force than they do to railway cars, because the Winnebago, as a ship engaged in interstate commerce, is at all times strictly within the provisions of the Acts of Congress, while a railway car of itself is but a part of a means of transportation, for without tracks and locomotives it cannot carry on commerce of any kind. The ship, however, travels the national and international highways under the constitutional right of navigation, and, under the Acts of Congress, must be enrolled and licensed, be provided with certain life-saving and fire-extinguishing apparatus, and must be commanded by officers who are examined and licensed by the laws of the United States. The ship, therefore, should be exempt from seizure by process from a state court while actually engaged in commerce, and still more so if she is not within any of the ports and places of the State of Michigan, but only passing through waters within its boundaries. We do not believe that the states have any authority to interfere with the constitutional right of navigation when that right is exercised by a ship which is not bound to, or within the limits of the state except as it passes through the same in going from one state to another.

VI.

THE CONTRACT TO BUILD A SHIP IS A MARITIME CONTRACT, AND THEREFORE THERE IS A LIEN FOR MATERIAL AND LABOR FURNISHED WHICH CAN BE ENFORCED IN A COURT OF ADMIRALTY, THERE BEING A LIEN UNDER THE STATE LAW.

The Winnebago, a steel steamer 200 feet long and of 1,059 tons burden, was built and launched at St. Clair, Michigan.

Under the laws of Michigan her builders and those furnishing material and labor to her that entered into and became a part of her, had a lien upon her.

If the contract for her construction or for furnishing the material and labor for her construction is maritime, then the admiralty courts of the United States have the sole right to enforce these liens.

It will be claimed that the contract was not maritime under the decision of this court in *People's Ferry Co.* v. *Beers,* 20 How., 40.

People's Ferry Co. v. Beers Reviewed.

In the case of *People's Ferry Co.* v. *Beers,* decided in 1858, the only question before the court was, whether there was a lien on the steamer Jefferson for the unpaid portion of the contract price for building her. The court decides that a lien provided in the building contract only amounted to a mortgage. There was no lien under the laws of New Jersey, where the vessel was constructed.

So that if there was no lien under the maritime law of the United States the libel must be dismissed. Mr. Justice Catron, after quoting at length from the opinion of the District Court, holding that the con-

tract *was maritime,* and that therefore there was a maritime lien on the vessel, begins by saying:

> "The question presented involves a contest between the state and federal governments."
>
> "The latter has no power or jurisdiction beyond what the constitution confers. * * *
>
> "The extent of power withdrawn from the states and vested in the general government depends on a proper construction of the constitutional provision above cited. Its terms are indefinite and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the constitution was formed—for what was meant by it then it must mean now. What was reserved to the states to be regulated by their own constitutions cannot be rightfully infringed by the general government, either through its legislative or judiciary department. *The contest here is not so much between rival tribunals, as between distinct sovereignties,* claiming to exercise power over contracts, property and personal franchises."

This statement is conspicuously remarkable because it starts out with the assumption that some one has raised the then burning question of state rights.

The great case of *Dred Scott* v. *Sandford* had only a short time before (at the previous term) been heard and decided, and the public was aroused, and the press at the time was filled, with comments for and against the decision of the court in that case. And all the people of the southern states, and many in the north had very decided convictions opposed to any further encroachments of the general government upon what they believed to be the rights of the states.

It is, herefore, not remarkable that this case presented as one that was to deprive the states of the right to legislate and enforce in its courts exclusively contracts so important as those relating to the building of ships, should emphasize the question of conflict between the state and the general government, and in order to raise the dignity of the contest, it was said that "*it was not so much between rival tribunals as between distinct sovereignties.*"

It was, therefore, no easy task to convince a court made up of justices who, all of whom, or nearly all of whom, had, or still affiliated with the political party then in power, whose adherents were exceedingly jealous of every attempt to deprive the states or their courts of what it was believed were their rights under the constitution.

It was the political aspect of the question that was of greater importance than the judicial, or historical; and it was therefore uppermost in the mind of the learned justice who wrote the opinion. That is why the decision begins as it does.

Considering the time when the decision was made, and the trend of public opinion on the question of state rights at that time, it is not extraordinary that the court decided the contract non-maritime, for only in that way could the case be disposed of so as to favor what was then believed to be the rights of the states.

We do not mean to cast any reflection upon the integrity, fairness or learning of the members of the court, as then constituted, but we cannot close our eyes to the fact that judges are human and mere men and had political views before they became

judges, and these with men at middle life and beyond are not lightly set aside, and we believe they influence and shape opinions and judgments, even in the best and justest of men and judges.

It is somewhat remarkable that at the same term of court that *People's Ferry Co.* v. *Beers* was decided the court, by a vote of five to four justices, in the case of *The Fashion*, 21 How., 244, held that a contract of affreightment for a carriage of goods from Two Rivers, Wisconsin, to Milwaukee, in the same state, was not a maritime contract.

At the same term the court also decided the case of *The Goliah*, 21 How., 253, and held that coal furnished for fuel, tot a steamer engaged in commerce on the Sacramento river, exclusively plying within the State of California, could not be recovered for, because the steamer was engaged in the internal commerce of a state.

The court then amended its 12th admiralty rule, so that no right to proceed *in rem* in cases of home supplies existed, saying:

> "We have determined to leave these liens depending on state laws, and not arising out of the maritime contract, to be enforced by the state courts."

So that we find that the court in these three cases deprived the Admiralty Courts of three most important contracts:

1st. The contract of carriage by water between places in the same state.

2d. The contract for furnishing supplies to a vessel so engaged.

3d. Contracts to build a ship.

Not content with this, the court also repealed its 12th rule so far as it applied to supplies furnished in the home port, and said:

> "We have at this term amended the 12th rule of the admiralty so as to take from the District Courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs which had been assumed upon the authority of a lien given by state laws, it being conceded that no such lien existed according to the admiralty law, thereby correcting an error which had its origin in this court in the case of *The Gen. Smith* (4 Wheat., 439), applied and enforced in the case of *Peyroux and others* v. *Howard and Varion* (7 Peters, 324), and afterwards partially corrected in the case of the steamboat *New Orleans* v. *Phoebus* (11 Peters, 175, 184)."

The first two cases were subsequently, in 1868, overruled in principle in the case of *The Belfast*, 7 Wall., 624, in which the court held that a contract to carry goods between Vienna, Alabama, and Mobile, in the same state, on the waters of the Tombigbee river, was maritime and exclusively within the jurisdiction of courts of admiralty.

The court seeks to distinguish this case from that of *The Fashion* by saying that the latter arose under the act of 1845, which conferred admiralty jurisdiction on the lakes in case of vessels of twenty tons' burthen engaged "in commerce and navigation between ports and places in *different* states and territories."

This position, however, is entirely destroyed by the court's holding in the case of *The Eagle*, 8 Wall., 15, *that the act of 1845 did not extend the jurisdiction*, saying, page 25:

"We have now examined it with care and given to it our best consideration, and are satisfied that since the decision of the case of *The Gennesee Chief,* the court must regard the District courts as having conferred upon them a general jurisdiction in admiralty upon the lakes and the waters connecting them, by the ninth section of the original act of 1789; and the enabling act of 1845, therefore, has become inoperative and ineffectual as a grant of jurisdiction; and, as it was an act, on the face of it, and as intended, in its purpose and effect, to extend the admiralty jurisdiction to these waters, we cannot without utterly disregarding this purpose and intent, give effect to it as a limitation or restriction upon it. We must, therefore, *regard it as absolete and of no effect,* with the exception of the clause which gives to either party the right of trial by jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it. The saving clause in this act, as to the concurrent remedy at common law, is, in effect, the same as in the act of 1789, and is, therefore, of necessity, useless and of no effect."

Unfortunately, within a year after *People's Ferry Co.* v. *Beers* was decided there came before the court the case of *Roach* v. *Chapman,* 22 How., 129, which was a libel for the balance of the contract price for the construction of the boiler and engines of the steamboat *Capitol.*

It was claimed that there was a lien on the steamboat under the laws of Kentucky, where the steamer was built, and that the cause of action arose prior to the amendment of the 12th rule in admiralty. (*Goliah,* 21 How., 248.)

The court, however, following the case of *People's*

Ferry Co. v. *Beers,* held the contract as being non-maritime, and said, p. 132:

> "It is said here that the law of Kentucky creates a lien in favor of the libelants; and that, as this case originated before the adoption of our rule, which took effect on the first of May, 1859, it may, upon the principles recognized by this court in *Peyroux* v. *Howard* (7 Peters, 343), be enforced in the admiralty. But (to quote the language of the court in *Orleans* v. *Phoebus,* 11 How., 184): 'That decision does not authorize any such conclusion. In that case the repairs of the vessel, for which the state laws created a lien, were made at New Orleans, on tide waters. The contract was treated as a maritime contract, and the lien under the state laws was enforced in admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty."

The contract for supplies furnished in the home port was held not to be maritime in the case of *The Goliah,* because the steamer was engaged in the internal commerce of the state on the Sacramento river, while in *Peyroux* v. *Howard* an identical contract was held to be maritime because *the tide ebbed and flowed at New Orleans, where the supplies were furnished.*

It was therefore not the employment of the vessel, but the tide that determined the character of the contract and decided whether it was maritime or not.

This position has, of course, been entirely abandoned and now the furnishing of supplies in the home port of any vessel on navigable water of the United States is a maritime contract and within

admiralty jurisdiction. The court, however, still adheres to the artificial difference between home and foreign supplies by denying the former a maritime lien.

The J. E. Rumbull, 148 U. S., 1.

Had the case of *Roach* v. *Chapman* come before the court at the same time the *Belfast* and *Eagle* cases were there, and had it been properly presented to the court, there can be no doubt (in the light of these cases) that the court would not have said what it did, and might have decided to practically overrule the *Beers* case, as it did the cases of *The Fashion* and *Goliah.*

It was not long after this, in 1872, that the 12th rule in admiralty was again amended so as to read as it does now, to include all contracts for supplies, etc., whether home or foreign.

Since the decision of *Roach* v. *Chapman* the same question has not been fairly before the court, although the court has in a number of cases referred to the *Beers* case as holding that the contract to build a ship is not maritime.

The question, however, was never presented squarely for argument or decision, and these expressions are therefore *obiter dictum,* but may have prevented the question from being presented to the court for reconsideration.

We believe that had the case of *People's Ferry Co.* v. *Beers* been brought before the court ten years later than it was, or at any time since then, the court's decision would have been the opposite to what it was. It was the political aspect of the case that took precedence in the minds of the members

of the court, and not the judicial, hence it may be said to be a political rather than a judicial decision.

In our own country, prior to the decision of *People's Ferry Co.* v. *Beers,* we find a long line of decisions in the lower courts holding that the contract for furnishing materials for the construction of a ship was a maritime contract. These decisions reflect the opinions of five different judges, and among their number are the illustrious names of Judges Story, Ware and Sprague, pioneer jurists, who had more to do with shaping the early jurisprudence in admiralty in this country than any other of the federal judges, and to whose learning, industry and wisdom we are indebted for much that is wise and admirable in our jurisprudence.

These judges, residing in states bordering on the sea, were more familiar with the history of maritime jurisdiction, the prevailing customs and usages among seamen, than were the judges of the higher tribunal, and their opinions are entitled to the greatest weight. Whether these decisions were called to the attention of the court at the time *People's Ferry Co.* v. *Beers* was decided we do not know, but they have lost none of their value as precedents in showing how the contract was considered in the trial courts for nearly fifty years.

Davis v. *New Brig,* Fed. Cas. 3643, decided in 1834 by Hopkinson, J.

Read v. *Hull of a New Brig,* Fed. Cas. 11609; 1 Story, 244, decided in 1840 by Story, J.

The Calisto, Fed. Cas. 2316, decided in 1840 by Ware, J.

The Hull of a New Ship, Fed. Cas. 6859, decided in 1842 by Ware, J.

Van Pelt v. *The Ohio*, Fed. Cas. 16870, decided in 1850 by Judson, J., in Ohio.

The Abbie Whitman, Fed. Cas. 15, decided in 1854 by Sprague, J.

Sewall v. *The Hull of a New Ship*, Fed. Cas. 12682, decided in 1855 by Ware, J.

Purinton v. *The Hull of a New Ship*, Fed. Cas. 11478, decided by Ware, J., 1855.

The Richard Busteed, Fed. Cas. 11764, decided in 1858 by Sprague, J.

Drew v. *Hull of a New Ship*, Fed. Cas. 4078, decided in 1860 by Sprague, J.

The Chas. Mears, Fed. Cas. 10766, decided in 1856 by Willson, J., in Ohio.

The analysis of the opinion of this court in *People's Ferry Co.* v. *Beers* resolves itself into three reasons for declaring a contract for building a ship non-maritime:

First. That the admiralty jurisdiction of the maritime courts of this country at the time of the framing of the constitution did not include such a contract.

Second. That the contract was made on land, to be performed on land.

Third. That there can be no lien on a ship when the owner is present.

We believe that we can show that some of these reasons were not valid when given and were therefore unwarranted, and that since this case was decided each one of them has been, in subsequent cases, declared by this court as not the law.

I.

THE CONTRACT WAS NOT MARITIME BECAUSE IT WAS NOT SO CONSIDERED AT THE TIME THE CONSTITUTION WAS ADOPTED.

We think that the above correctly states the first reason given by Mr. Justice Catron for deciding that the contract to build a ship was not maritime.

This reason had no support whatever unless it was conceded that the sole guide for determining the limits of admiralty jurisdiction in this country was the jurisdiction in admiralty in England.

We may as well admit at the outset that this contract had no standing in the English admiralty courts when the constitution was formed, because under the Statutes of Richard the admiralty jurisdiction only extended to "contracts of wages, bottomry bonds and other contracts made and to be performed on the high seas."

N. J. Steam Nav. Co. v. *Merchants Bank,* 6 How., 378.

On page 389 the court says:

> "1. That the arguments used in the present case against the jurisdiction, and in favor of restricting it to the common law limit in England at the Revolution, have been heretofore presented to the court, on several occasions, and at a very early day, and on each, after careful consideration, were rejected, and the judgment of the court placed upon grounds altogether inconsistent with that mode of construing the constitution; and,
>
> "2. They affirm the practical construction given to the constitution by Congress, in the act of 1789, which, we have seen, assigns to the district courts, in terms, a vast field of ad-

miralty jurisdiction unknown to that court in England.

"The jurisdiction in all these cases is maintained on the broad ground that the subject-matter was of admiralty cognizance, as the causes of actions rose out of transactions that had occurred upon the high seas, or within the ebb and flow of the tide; expressly rejecting the common law test, which was attempted to be applied, namely, that they arose within the body of a county, and, therefore, out of the limits of the admiralty."

On page 390 the court says:

"2. Another class of cases in which jurisdiction has always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship carpenters and material men, for repairs and necessaries made and furnished to ships, whether foreign, or in the port of a state to which they do not belong, or in the home port, if the municipal laws of the state give a lien for the work and materials. 1 Pet. Adm. R., 227, 233, note; Bee's Adm. R., 106; 4 Wash. C. C. R., 453; 1 Payne, 620; Gilpin, D. C. R., 203, 473; 1 Wheat., 96; 4 *ibid.*, 438; 9 *ibid.*, 409; 10 *ibid.*, 428; 7 Pet., 324; 11 *ibid.*, 175."

The limits of admiralty jurisdiction at the time of the revolution were so narrow in England, that the jurists in this country found it necessary to either emasculate the admiralty jurisdiction, or boldly construe the judicial grant as embracing more than was given in England. In order to do this reference was had to the admiralty jurisdiction exercised during the time of the colonies, and it was claimed that the framers of the constitution, being familiar with the colonial admirality jurisdiction, had it in mind at

the time of the introduction into the constitution of the admiralty clause, and it has been urged that the admiralty jurisdiction of the colonial courts embraced many subjects not to be found in the admirality jurisdiction of the mother country, including waters and territory other than that in which there was a tide.

The commissions issued by the King to the governors of the colonies, notably that of New York, Connecticut and East and West Jerseys, grant authority in the broadest and most comprehensive terms on the questions of jurisdiction in maritime matters.*

It will be noticed that in the commission issued by King Geo. III to Richard Morris (Ben. Ad., 82) power was granted "to take cognizance of and proceed in all cases * * *" according to the civil and maritime laws and customs of our High Court of Admiralty of England, *anciently used*, and by all other lawful ways, etc. And again (Sec. 158):

> "To proceed in the same according to the civil and maritime laws and customs of our aforesaid court, *anciently used*, as well as those of mere office mixt or promoted."

The point is well taken by Mr. Benedict (Sec. 161, Ben. Ad.), where he says:

> "In these commissions and letters patent were found the source, extent, and definition of the admiralty and maritime jurisdiction in the colonies. I am not aware that, up to the Revolution, any British statute in relation to the admiralty jurisdiction named the colonies; and the well known principles that statutes do not

* See copy of these commissions in Ben. Ad. under the head of Colonial Admiralty Jurisdiction.

bind the colonies unless they are named, and that the king's commission runs through his whole dominions, are sufficient to make these commissions the legitimate source and law of the admiralty jurisdiction in the colonies. They declare that jurisdiction to extend to all causes, civil and maritime, embracing charter parties, bills of lading, policies of assurance, accounts, debts, exchanges, agreements, complaints, offences, and all matters which in any manner whatsoever relate to freight, transport money, maritime loans, bottomry, trespasses, injuries, extortions, demands and affairs whatsoever, civil and maritime. These general words are of the most comprehensive character, and include all matters which are in their nature maritime, while all those causes of which jurisdiction has been denied to the English admiralty, are especially enumerated as admiralty and maritime causes."

That the admiralty jurisdiction in England at the time of the Revolution is no longer the criterion is well established. The court has said that the admiralty jurisdiction of the colonial courts prior to the Revolution was much broader, and comprehended a greater variety of subjects than were embraced within that jurisdiction in the Home Country, and it is said that this broader jurisdiction was in the minds of the framers of the constitution, and that the broad language of the constitutional provision was intended to embrace a jurisdiction at least as broad as that of the Colonial Vice-Admiralty Courts. We deem it fair to say that since the decision of *People's Ferry Co.* v. *Beers,* and beginning with the decision in the case of *The Genesee Chief,* the jurisdiction of the Admiralty Courts has been greatly extended, and that authority for this extension is

placed upon the broad ground that the language of the constitutional provision did not limit the court to the limits of admiralty jurisdiction of England, the Colonies, or any one country, but that it embraced them all, and every source that could be brought to the attention of the court and considered as throwing light upon what was properly within that jurisdiction. So that the court may have before it conveniently the learned views of Mr. Benedict, the author of Benedict's Admiralty, upon the subject of shipbuilding contracts, and at the same time the historical review and the various authorities, we take the liberty of printing here what this author has said on the subjects of contracts for building ships, beginning at section 264.

"The building contract is a maritime contract." Whether it be verbal or written, express or implied, "all matters that concern owners and proprietors of ships, as such, and shipwrights, are within the admiralty jurisdiction."

Davis v. *A New Brig,* Gilp., 473.
Harper et al. v. *A New Brig., id.,* 536.
The Hull of a New Ship, Davies, R., 199.
Godol, 43; Benedict Ad., Sections, 50-95-105-151.

In the cases of the *People's Ferry Co.* v. *Beers,* and *Roach* v. *Chapman,* the Supreme Court says that the contract for building a ship is not a maritime contract, because it is a contract "made on land to be performed on land; the wages of the shipwrights have no reference to a voyage to be performed." It cannot, however, with strict propriety, be said that a ship is built on the land. Her

keel is indeed laid in an inclined plane on the shore, and her frame is forcibly kept from the water, until her hull is so far advanced as to be buoyant. At the proper time she is allowed to slide into the water, where she is made a ship. *Finis coronat opus.* From the time when her keel is laid to the last work upon her rigging, not a timber is framed, not a spike or treenail is driven, nor a plank, a rope, a block, or an earing is put in place, except for the direct, useful, maritime purpose of making her a seaworthy ship. On the land she is useless; she can neither stand nor go. On the water she is the perfection of usefulness, as the great agent of maritime commerce, to whose wants and exigencies, and perils, she must be well adapted by the builder. And this is his contract, and his wages have reference to all her voyages to be performed. The navigable waters, and their perils, and the ship and her owners, and sailors, and cargo, are all there is in maritime commerce and admiralty jurisdiction, and Valin may well say, "what would be the function of admiralty courts, if they had not the jurisdiction of the building, rigging, furnishing, outfit, sale, and adjudication of vessels?" The maritime law, as laid down by all the great civilians and jurists, embraces contracts for building, repairing, supplying, and navigating ships.

De Lovio v. *Boit*, 2 Gall., 475.

By the Civil Law:

> "Whoever gives credit for building, or furnishing, or repairing a ship, has a lien upon it."
>
> "What any one gives credit for, for the purpose of building, repairing, furnishing, or out-

fitting, or even selling a ship, is a lien upon it."

By the Consulat:

"If a ship, newly built, is sold at the suit of creditors, before it has been launched, or before it has made a voyage, the mechanics, caulkers, and other workmen, as well as those who have furnished timber, pitch, spikes, and other things necessary for the building of the ship, shall be preferred to all other creditors whatever, even to those who may have lent money, with a written declaration that it is to be used in the building of a vessel."

Cleirac, to the same effect, says:

"Hypothecation is special and privileged for the wages of the carpenters, caulkers, and other workmen, and for those who have furnished tar, pitch, casks, timber, spikes, oakum, and other materials for the building or repairing a vessel."

The Marine Ordinance of 1691 is equally clear:

"The judges of the admiralty have jurisdiction exclusively of all others, and between all parties, of everything which concerns the building, tackle, apparel, furniture, outfit, victualling, sale, and adjudication of vessels."

In like manner, Valin, commenting on this article of the ordinance:

"There is never any dispute in relation to the objects expressed in this article, which concern the *building, rigging, furniture, outfit,* sale, and adjudication of vessels (the italics are his); and in truth what would be the function of admiralty courts, if they had not jurisdiction of such causes?"

Emerigon quotes with approbation, and as authority, the foregoing and other similar passages, in Chapter 12, Sections 3, 4, 5, of this treatise on maritime loans, and on page 566, quarto edition, says:

> "There is nothing so much favored as the price of work and materials for the building of a vessel. Commerce and the state are interested in it. It is just that the workmen and material men should enjoy the lien upon the thing, which is given them by the Marine Ordinance. They cannot be deprived of this privilege except when it is proved that they trusted the person, not the thing."

Boulay-Paty, in more recent times, in his commentaries on the Commercial Code, in which the jurisdictional clauses of the ordinance are re-enacted, Sections 1 and 2, as does also the Nouveau Valin, bring down to our own time, in equivalent words, this maritime law of all the ages.

Even the English judges, with the king and his council, in the resolutions of 1632, say (Resolution 3, *ante*, p. 95):

> "If suit shall be in the Court of Admiralty, for building, amending, saving or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, although this be done within the realm."

And if we pass behind these great commentators to the original codes of all the maritime states and cities, which the wonderful industry and learning of Pardessus have brought together, in his great work (6 vols. quarto), "Collection de Loix Maritimes,

Anterieures au XVIIIe Siecle," we find that the history, the text and the commentary of the codes and collections of maritime usages, from the earliest periods of antiquity, leave no room to doubt the maritime character of contracts for building, repairing and supplying ships, and their lien upon the ship. And it can hardly fail to excite surprise that the decisions of the most learned judges, who have made the admiralty law under the constitution and the decisions of the Supreme Court the study of their lives, should have been overruled on the authority of *two little-considered decisions of an inland judge of a state court,* before the constitution had any existence.

If it were conceded that "liens on vessels encumber commerce and are discouraged," it could not overrule the maritime law. But liens, instead of encumbering commerce, facilitate it. They furnish to the ship-builder and ship-owner a necessary facility and security for credit, in carrying on their enterprises till the completion of the ship, when she can be sold and payment made from the proceeds; or, in case of repairs or supplies, till the earnings of a voyage may be appropriated to the payment of her bills. If no builder or ship-owner could use his vessel as a means of getting money, or credit everywhere, not only where he is not known, but where he is known, not only where the vessel does not belong, but in her home port, when the owner himself negotiates the transaction, none can know so well as those familiar with maritime commerce what beneficial enterprises must fail and what commercial intelligence and skill must go unemployed, or be brought to ruin by the unforeseen accidents of

the sea. In the language of Emerigon, "it is just that the workmen and material men should enjoy the lien upon the thing which is given them by the Marine Ordinance. They cannot be deprived of this privilege, except when it is proved that they trusted the person, and not the thing." The lien is always presumed, but it may be disproved. "There is nothing so much favored." "Commerce and the state are interested in it." Sir Leoline Jenkins has ably pointed out the inconvenience to the public and to trade, if the admiralty jurisdiction be evaded—among other things, as to building and victualling ships, and as to material men, that is, those who furnish materials or supply work for ships.

De Lovio v. *Boit,* 2 Gal., 466.

Sec. 265, the same:

> "The builder may sue the owners *in personam* in the admiralty, to recover whatever is due to him for his services, or for violations of the building contract in the construction of the vessel, and he has also a lien or privilege for the building service against the ship herself, which may be enforced in the admiralty. The building contract being maritime, it is evident that the owner may sue the builder in the admiralty for violations of the contract in building the ship. The distinction between maritime contracts and agreements leading to or preliminary to maritime contracts, and contracts wholly or partly performed and those not entered upon, has been adverted to, and must not be lost sight of."

As long as these decisions stand they will continue one of the most remarkable differences between the maritime law as held in this country and

that of the most maritime countries. It is now over forty years that the case of *The People's Ferry Co.* v. *Beers* was decided. But twenty-six years had elapsed between the decision of the case of *The Thomas Jefferson* and that of *The Genesee Chief,* which reversed it. *It is not, therefore, impossible that the question whether a contract to build a ship is maritime may again be brought before the Supreme Court for examination.* If the question should ever be brought before the court again, the considerations which have led that court to the larger views of the admiralty jurisdiction which now obtain, may very well lead to the adoption of the opposite view. In every maritime country except our own, the admiralty courts have jurisdiction over contracts for the building of ships. Even the English admiralty exercised that jurisdiction after the Resolutions of 1632, as is stated in the petition of the merchants, *ib.,* 1690. (See *ante,* p. 108.) And under the commission of the Vice Admiralty Court of Massachusetts this jurisdiction was exercised, for in the records of the court is to be found a suit by a builder of a ship *in rem* for his price after it has been delivered.

Insurance Co. v. *Dunham,* 78 U. S. (11 Wall.), 10.

To hold such a contract to be maritime and within the jurisdiction of the admiralty would be again "*stare super antiquas vias.*"

Conkling's Work on Admiralty, in its last edition, was published in 1857, a year before the case of *People's Ferry Co.* v. *Beers* was decided, and the subject of the contract for building a ship is there-

fore not treated separately. The author, however, quotes from Judge Story's decision in *De Lovio* v. *Boit* (*supra*), in which such a contract is included with the other maritime contracts, and it may, therefore, be considered as included by the author.

Henry, in his work on Admiralty, briefly states, Sec. 21, what is decided in *People's Ferry Co.* v. *Beers.*

Parsons, in his work on Shipping and Admiralty, second edition, 1869, says, 2 Parsons Sh. & Ad., 327, as follows:

> "Can the builder of a ship sue in admiralty for a breach of the contract? We know of no reason on principle why there should be any difference between a contract for building and a contract for repairing, and should hold that, while a lien cannot be enforced for building if the builders and owners of the vessel reside in the same state, the admiralty should have jurisdiction where the parties to the contract live in different states, and that in cases of domestic vessels the admiralty should exercise jurisdiction *in personam,* as we regard the building of a vessel as much a maritime transaction as the repairing of the vessel."

Let us examine the ancient jurisdiction of England to ascertain its extent before the encroachments of the common law courts upon it.

The ancient jurisdiction of the English Admiralty Courts comprehended the same subjects as the old Consular Courts of the Mediterranean, on the model of which it was formed—governed by the ancient laws, customs and usages of the sea as laid down in the laws of (1) Rhodes and Oleron; (2) Wisbuy; (3) Hanseatic Ordinances; (4) Colsolato del Mare; (5) Marine Ordinances of Louis XIV—all of which

gave admiralty jurisdiction over contracts to build, as maritime contracts. See

Bruce and Williams Admir. (3rd Ed.), p. 198.

3 Reeves Eng. Law, 197.

Pardessus (Collection des lois maritime anter. au XVIIIe siecle).

Pardessus (Us et contumes de la mer.).

And this broad jurisdiction in the admiralty continued until the jealousy of the English common law courts prompted the restriction of admiralty jurisdiction by the Statutes of 13 Rich. II, c. 5, and 15 Rich. II, c. 3, to matters *wholly* (actually) done *on* the *sea.*

These restrictions were largely ignored by the admiralty courts—calling forth the Statute of 2 Hen. IV, c. 11 (since repealed by Admiralty Court Act, 1861; 24 Viet., c. 10), which laid the admiralty judges under a liability in damages for exercising their old jurisdiction which the Statutes of Richard II took away.

Yet, in spite of all this narrow attitude against their inherent jurisdiction, the admiralty courts still continued to assert that jurisdiction over "all contracts of freight-bottomry, mariner's wages, charter parties, and *all contracts for the building of ships,* and for repairs and supplies thereto," down to the time of the Commonwealth. (See Godolphin's Adm. Juris., Cap. IV, p. 45 *et seq;* also Cap. VIII, p. 91 *et seq.)*

This tendency of the Admiralty Court, even after the Statutes of Henry IV. brought down upon its head the supreme manifestation of the jealousy of the common law courts in the latter's recourse to

a doctrine that only escaped being monstrous by its absurdity, i. e., "the fiction of supposing the matter, *though done at sea,* to be done on *land!*" And, moreover, this fiction was not traversable!! (See Lord Coke's 4th Inst., 75, 135.)

This seems to have been the climax for the prosecution, for in 1575 the dispute was referred to the king (James I), which resulted in a written agreement between the contending judges to the effect that (among other provisions) "the admiralty might have and enjoy, without any let or prohibition, the cognition of *all* contracts and other things arising as well *beyond* as *upon* the seas, though made on *land.*" (See Edward's Admir. Juris., 21.)

In 1632 (Charles I) the judges signed another agreement of five clauses, the third of which gave admiralty jurisdiction over "suits for *building,* mending, saving, or necessary victualling of a ship," even "though *within* the realm." (Godolphin's Adm. Jur., cited above.)

This put the admiralty jurisdiction, in some measure, back where it began as an inherent matter—but soon after this propitious situation the civil war unfortunately threw the question into confusion again when the office of Lord High Admiral was abolished by the Commonwealth.

At the restoration judicial prohibitions again issued freely against admiralty courts in the interpretation of the Statutes of Rich. V and Hen. IV (and in disregard to the later *agreements* between the judges) to the extent that Lord Stowell suffered by a verdict against him for nearly $20,000 for exceeding what the courts of *law* held to be his jurisdiction when he entertained a suit in admiralty on a

claim for *necessary supplies,* and the jurisdiction of admiralty was withdrawn as to claims for "the building of, or repairs or supplies to, ships," and, in fact, as to *all* questions of title to ships.

That limitation, as to claims for *building* ships, was a fixed one (left unaffected by Statute of 3 and 4 Vict., c. 65, which removed judicial prohibitions) until the Statute of 24 Vict., c. 10 (4th sec.) restored the *building* contracts to the present jurisdiction of admiralty nearly where they were originally and where, unquestionably, they belonged. See

The Wasp, L. R. I. & E., 367.
The Two Ellens, L. R. 4 P. C., 161-168.
The Cella, 13 P. D., 82 (note opinion of Lord Esher at p. 86).
The Skipwith, 10 L. T., 43.
The Pacific, 1 Brow., 7 Lush., 243.
William & Bruce's Admir. (3d Ed.), 198.

NOTE:—See an essay in the preface to a translation of Clerk's Praxis. by John E,. Hall, editor of the American Law Journal, in 1808, wherein he shows that there were no traces, in that author's time, of such a limited jurisdiction as the Admiralty Courts of England possessed before the statute *now* in force returned, to a large extent, the original admir. jurisdiction.

It extended to all cases of "freight, charter parties, bottomry, mariner's wages, *debts due to material men for the building and repairing of ships.*"
See 1 Amer. L. J. (Hall's), 419.

This narration of events in the history of admiralty jurisdiction in England, over claims for *building* ships, shows that such jurisdiction was

originally in admiralty, and that, in the absence of statutes, it would be well fixed there today, as a matter of *general maritime law*. Indeed, that jurisdiction has been, to a degree, restored to admiralty by Statute of 24 Victoria, as cited above.

SCOTLAND AND IRELAND.

The Scotch and Irish admiralty courts had inherent jurisdiction over contracts to *build* ships from the earliest times until restricted by Statute of 1681. See

Cobb and Mitchell v. *Patrick Insurance Co.*, 11 S., 993.

The Shannon, 6 Jur., 82 (Irish).

The case of *People's Ferry Company* v. *Beers* was for the first time brought into prominent notice after its decision in the case of *Morewood* v. *Enequist*, 23 How., 491. This case arose out of a breach of contract of charter party, and it was contended that under the admiralty jurisdiction in England at the time of the adoption of the constitution, there was no jurisdiction over contracts of charter party or affreightments, and that by the decision in the *People's Ferry Company* v. *Beers* case the court had returned to the principle that it was to be governed by the limits of the jurisdiction in England existing at the time when the constitution was formed, when using the words, "for what was meant by it then, it must mean now."

Mr. Justice Grier, after giving the substance of the opinion of Mr. Justice Catron in *People's Ferry Co.* v. *Beers*, says, on page 495:

"The arguments used in stating the opinion

> of the court must be referred to the subject before it and construed in connection with the question to be decided. They had no reference whatever to any former decisions of this court on the question *now* (it is hoped for the last time) mooted before us."

It was apparent, therefore, to the court at that time, as indicated by Justice Grier's opinion, that there was room for argument, at least, that the court had not been sufficiently broad in its statement of the sources and limits of the admiralty jurisdiction at the time of the adoption of the constitution. It is evident, to anyone familiar with the history of the extension of the admiralty jurisdiction in this country, as it appears from the decisions of this court, that too narrow a view was taken of the subjects of admiralty jurisdiction, and in arriving at the conclusion that the contract to build a ship was not a maritime contract, the court lost sight of the broad admiralty jurisdiction of the colonial courts at the time of the adoption of the constitution, and that of the different maritime nations, as evidenced by their codes, in all of which the contract for building a ship is held to be a maritime contract and within the jurisdiction of admiralty courts. One is forced to the conclusion, in reading *People's Fe Company* v. *Beers*, that the court did reject this contract as being maritime, because it was not included among the contracts over which the English admiralty courts had jurisdiction at the time the constitution was adopted. The reasons or causes for this have been matter of conjecture only, but there is at least room for the belief that the position was taken because it was feared that the federal courts

were trespassing too much upon the rights of the state courts, an all important question before the people at that time.

Mr. Justice Bradley, in the case of *Insurance Company* v. *Dunham,* 1 Wall., 1, 28, says:

> "The case of *The People's Ferry Co.* v. *Beers* (23 Howard, 493), being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract *made* on land and to be *performed* on land, Justice Grier remarked: 'The court decided in that case that a contract to build a ship is *not a maritime contract;*' but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases."

Since the decision of *People's Ferry Company* v. *Beers* there has been no attempt made to limit the sources from which the admiralty jurisdiction in this country is to be derived.

The *Beers* case was clearly a step backward in the progress of the movement to define the limits of admiralty jurisdiction and in that respect resembles the decision of *Cutler* v. *Rae,* 7 How., 729. That was a case of a libel *in personam* to enforce a general average contribution, and it was held that admiralty had no jurisdiction of such a case and that it belonged to the common law courts. Justice Wayne vigorously dissented.

In the subsequent case of *Dupont De Nemours* v. *Vance,* 19 How., 162, the court practically overruled the case of *Cutler* v. *Rae* when there was before it a case in which a libel suit had been filed for

non-delivery of a cargo, and the defense had been interposed that the cargo had been jettisoned. The court held there was a maritime lien.

In the statement of Justice Wayne in the appendix of 8 How., it was stated that *Cutler* v. *Rae* was not thoroughly considered; that the printed argument in favor of the jurisdiction was not before all of the court, and was not alluded to in conference; that the decision was made by a divided court, Catron, J., not giving an opinion because he was not satisfied either way; that the remaining eight judges were at first equally divided, and that it was finally disposed of rather from acquiescence in what was thought to be English authority against the jurisdiction than from any searching scrutiny of the practice and jurisdiction of courts of admiralty in general.

If the reason as to the limits of admiralty jurisdiction given in *People's Ferry Company* v. *Beers* is not now, and was not at the time it was given, sound and proper, then it does not support the decision and the case comes within the familiar rule that when a reason for a rule fails, the rule itself must fail.

II.

THE CONTRACT WAS NOT MARITIME BECAUSE IT WAS MADE ON LAND TO BE PERFORMED ON LAND.

The second reason given by Mr. Justice Catron for holding that contract to build a ship was not maritime is this:

> "So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere),

it was a contract made on land, to be performed on land.'' Citing *Chilton* v. *The Brig Hannah Bees,* Ad., 345, in support of the statement.

This reason was not, at the time it was given, a sound valid reason under the decisions of this court, and since then it has been entirely invalidated by the decision of *Dunham* v. *Insurance Company,* 11 Wall., 1.

In using this language the learned justice fell back upon the declaration of principles governing maritime contracts that was used in England, and which in that country was the main cause for depriving the admiralty courts there, of a jurisdiction over subjects which formerly had been in England, and still were proper subjects for admiralty jurisdiction in all other countries. We know that in England the admiralty courts were deprived of jurisdiction in every case in which it could be said that the contract was made on land, without reference to whether it was to be performed on the sea or not, and a contract which was to be performed on land, though made at sea, was not within the jurisdiction because of its place of performance.

In the case of *The Magnolia,* 20 How., 296, the dissenting opinion of Justice Daniel calls attention to the fact that in that case the contract, which was for the transportation of goods on the Alabama river, was made on land and that, therefore, the court ought not to assume jurisdiction in admiralty over it.

The distinction between maritime contracts made on land and such as are made at sea has been entirely abolished in admiralty in this country so far as determining whether they should be within the

jurisdiction of admiralty courts or not. The courts have taken broader ground, and with the exception of contracts for building a ship, all contracts that have to do with ships are considered maritime, and, therefore, properly within the jurisdiction of our admiralty courts.

Upon the point of locality with reference to making contracts Justice Bradley, in *Insurance Company* v. *Dunham*, 11 Wall., 1, says:

> "With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.
>
> "Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it. See 11 Wall., U. S., Book 20.
>
> "But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. * * *
>
> "In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long established rules of the English courts."

We also refer to the language of Judge Story in the opinion of *De Lovio* v. *Boit*, 2 Gall., 398, Fed. Cas. No. 3776, decided in 1815, as follows:

> "The next inquiry is, what are properly to be deemed 'maritime contracts?' Happily in this particular there is little room for controversy. All civilians and jurists agree that in this appellation are included, among other things, charter parties, affreightments, marine hypothecations, *contracts for marine service in the building, repairing, supplying and navigating ships;* contracts between part owners of ships; contracts and *quasi* contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, policies of insurance. S. P. Johnson, J., in *Croudson* v. *Leonard*, 4 Cranch (8 U. S.), 434; Clierac, Le-Guidon, C. 1, p. 109; *Id.*, C. 3, p. 124; *Id.*, Jurisd. de la Marine, p. 191; 1 Valin Comm., 112, 20, etc.; 2 Emrt., 319; Godolph., 43; Zouch, 90, 92; Eaton, 69, etc., 295, etc.; Malyne, Lex Merc., 303; *Id.*, Collection of Sea Laws, X 2, p. 47; Consol. del Mare., C. 22; 2 Brown, Adm., C. 4, p. 71; 4 Bl. Comm., 67; *Stevens* v. *The Sandwich (supra);* Targa, Reflex, C. 1."

As Justice Bradley says in *Insurance Company* v. *Dunham*, p. 35, quoting Mr. Browne:

> "What is the *rationale*, and what the true principle which ought to govern this question, viz.: What contracts should be cognizable in admiralty: Is it not this? All contracts which relate purely to maritime affairs, the natural, short and easy method of enforcing which is found in the admiralty proceedings."

The criterion is not where the contract is made, or where it is to be performed, but rather whether it concerns ships and maritime affairs. And this should be the only criterion.

The reasons, therefore, given by Justice Catron, that a contract for building a ship, being a contract made on land, to be performed on land, and there-

fore not maritime, is no longer the law in any case, for the purposes of determining admiralty jurisdiction, and as to this reason, we say, as we have said in reference to the first reason given by the learned justice, that the reason of the rule having failed and being no longer valid, the rule itself should be changed.

III.

THERE CAN BE NO LIEN ACQUIRED BY A MATERIAL MAN WHEN THE OWNER IS PRESENT.

This is the third reason given by Mr. Justice Catron for holding that the contract to build a ship is not maritime.

This reason also is founded upon the limitations of the admiralty jurisdiction in England at the time of the adoption of the constitution. There, at that time, the contracts for building, repairing or victualling a ship were not maritime contracts. The contracts, therefore, were mere personal contracts of the owner over which the common law courts alone had jurisdiction. The learned justice, therefore, again resorted to the laws of England for the purpose of determining the limits of the admiralty jurisdiction here, and finding the contract there excluded, promptly excluded it here. The main reason for granting liens to those who furnish, supply and repair ships is that, as a member of this court has said: "to furnish arms and legs to the ship." The ship, by having good credit, could obtain the necessary supplies and repairs to enable her to prosecute her voyages. Without that credit she might be prevented from finishing the voyage begun because unable to obtain supplies and repairs at even an intermedi-

ate port, or a port of distress. It, therefore, has been the policy of all maritime nations to grant a lien to him who supplies necessaries to a ship. It is through the jealousy of the common law courts that such a lien was taken from and denied to the supply man in England. In this country it never has been the rule.

The distinction that there should not be a lien upon the ship for necessaries, if the owner was present at the time and place, when and where they were ordered and furnished, was a distinction that formerly was made, but has now been overruled and is no longer considered a valid reason for denying the lien. In determining whether there should or should not be a lien in a given case, the necessities of the ship are the only criterion, and not the presence, or credit of the owner. The reason for the lien is necessity, and this is also the policy of the nations, and we, therefore, find that this court, in its later decisions, abolished the distinction, and now grants a lien in any case of the ship's necessity, even when the owner is present.

The Grapeshot, 9 Wall., 129:

In that case supplies were furnished at Baltimore to a steamer owned in New York, and this court, after reviewing the authorities, announced five propositions of law, which practically hold that there shall be a lien in cases of contracts for repairs and supplies, whether express or implied, enforceable in admiralty, where proof is made of necessity for them, and in such a case a conclusive presumption will arise (in the absence of evidence to the contrary of the necessity for credit). The third proposition is stated as follows (141):

> "3. Necessity for repairs and supplies is provided where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship."

The Guy, 9 Wall., 758:

In this case supplies were furnished at Baltimore to a steamer owned in New York upon the request of the agent of the owner. The District Court held that there was a maritime lien and this was affirmed by the Circuit Court and also by this court upon the authority of *The Grapeshot.*

The Lulu, 10 Wall., 192:

In this case the rule laid down in the case of *The Grapeshot* was followed, and Mr. Justice Clifford, on page 203, says:

> "Remarks are found in two cases decided by this court quite at variance with that rule, but it is unnecessary to comment upon those cases or to enter into any explanation of those remarks, as it is clear that if they assert any different rule of decision, they are in that respect directly overruled."

The court probably refers to the case of *Thomas* v. *Osborn,* 19 How., 22, in which it was held that a master could not bind the owners for repairs except by a contract of bottomry, and in this respect the court was following the laws of England.

In the case of *The General Custer,* 10 Wall., 204, Justice Clifford again says:

> "Objection is also made that the advances cannot be held to be a lien upon the steamer, because some of the repairs and supplies were

ordered by the owners in person, but the objection is entitled to no weight, as the evidence shows that it was expressly agreed that the advances should be furnished on the credit of the steamer. *(The Grapeshot (supra); The Guy (ante,* 710); S. C., 1 Ben., 112; *The Lulu (supra).*"

The Patapsco, 13 Wall., 329:

This was a case of coal furnished at Baltimore to the steamer Patapsco, owned in New York. It appeared that the owner's agent at Baltimore ordered all of the coal, and that it was charged to the Commercial Steamboat Company, the steamer's owner, and, therefore, it was contended that there could be no maritime lien. The court, however, affirmed the decisions of the District and Circuit Courts and held that there was a maritime lien under these circumstances.

Under these authorities we believe we are justified in saying that whether the owner was present or not at the time that necessary supplies and repairs were furnished, is unimportant in determining whether there should be a lien or not, and if that is so, then it is much more unimportant whether he was present or not, for the purpose of determining whether the given contract is maritime or not. The presence of the owner, therefore, has nothing to do with the case. It certainly cannot be said in the light of these decisions that even in the case of the written contract for the building of a ship, while the latter remains in the possession of the shipbuilder, he was building it on the personal credit of the owner or person who ordered it. His right of possession, and the lien which it gave him, aside

from any statutory lien that he may have under the laws of a particular state, was the best security, and the same kind of security that the supply man had who furnished necessaries to a ship during the voyage.

The distinction, therefore, made by Justice Catron has been entirely abandoned as a criterion, and the reason he gave is therefore no longer valid, and the rule which it is supposed to uphold, therefore, has no longer any support, and is therefore without reason. Neither can it be said, using the language of the learned justice, "that secret liens are to be discouraged." All maritime liens are in their very nature more or less secret; they must be, for there is no provision in the maritime law or the federal statutes for publishing or recording them. This is now known to all persons who deal with ships, and, while now and then there may be a case of hardship due to the secret character of the lien, this is more than offset by the superior advantages to the ship owner and to commerce. They are easily provided against in case of sale by security and bonds.

This secrecy is no longer a reason for denying the maritime character of a contract. It never ought to have been if it was; it certainly has no force now.

THE CONTRACT SHOULD BE HELD TO BE MARITIME.

Until the contract for building a ship is held to be maritime, there remains a flaw in our system of admiralty jurisdiction. It cannot be a perfect and harmonious whole until this ban is removed. The present system is incomplete.

This contract is needed to round out and perfect

our system of admiralty jurisprudence, and bring it back to where it once was in England, and into harmony with the admiralty jurisprudence of the other maritime countries of the world.

The owners for whom ships are now being built can only be benefited by having a national law take the place of the different dissimilar watercraft laws now found on the statute books of the states bordering upon navigable water.

The shipwright can only be benefited by having the contract for the creation of the ship raised to the dignity of a maritime contract "alongside" of the contract for repairing, rebuilding and altering the ship while on the ways on land, or in the dry dock. The latter are held to be maritime now, although at one time they were excluded.

Judge Lowell (in 2 Lowell, 477, 1876) says:

> "The notion that the maritime character of a contract depends on the *situation* of the vessel reached its climax when it was held that a laborer who scrapes the bottom while in the dry dock has no lien.
>
> "These decisions were made during a time after Judge Story's death, when the Supreme Court seemed bent on narrowing the jurisdiction in all possible directions, by decisions, some of which have now been overruled, and others explained to mean much less than they appeared to intend."

The Robert Parsons, 191 U. S. 17:

In this case it was held that repairing a canal boat in a dry dock in the home port was a maritime contract.

Step by step this court has brought back to the

Admiralty Court the jurisdiction which admiralty courts formerly had in England, and which they always had in all of the maritime codes which we have quoted from or referred to in this argument, the latest of these steps being the recognition as a maritime tort of a claim for damage done to an object fastened to or imbedded in the land.

The Blackheath, 195 U. S., 361:

This case practically rounds out into a harmonious whole the jurisdiction of our admiralty courts in matters of tort, and brings us almost if not quite within the Act of Parliament of England which provides that admiralty has jurisdiction of all damages done by any ship. And this is as it should be. It does away with the arbitrary distinction which makes it possible, as was the case in the case of *The Maud Webster,* 9 Ben., 547, Fed. Cas. 9302, of holding that the damage to the schooner which struck a derrick was a subject of admiralty jurisdiction and could be so tried, while the damage to the derrick in the same collision was not a maritime tort and could not therefore be inquired into by the Admiralty Court.

We can close this part of our argument with no better words than are used by Mr. Justice McLean in the case of *The Magnolia,* 20 How., 296-307:

> "Antiquity has its charms, as it is rarely found in the common walks of professional life; but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. Whether it be common, chan-

> cery, or admiralty law, we should be more instructed by studying its present adaptations to human concerns, than to trace it back to its beginnings. Everyone is more interested and delighted to look upon the majestic and flowing river, than by following its current upwards until it becomes lost in its mountain rivulets."

We are asking the court now to overrule the case of *People's Ferry Co.* v. *Beers,* decided in 1858,

First. Because it was decided erroneously.

Second. Because the court has since overruled many cases which were then considered binding authority in that case.

Third. Because the reasons given in that case for the decision are no longer valid.

Fourth. Because the contract for building a ship is a maritime contract everywhere else in the world.

Fifth. Because it is right and proper that it be restored to the jurisdiction of the Admiralty Courts.

Sixth. Because the case is merely a rule of jurisdiction and not of property or human conduct.

The Rule of Stare Decisis.

The only reason that can be urged against overruling the case of *People's Ferry Co.* v. *Beers* is: the rule of *stare decisis.*

We are fully aware of the importance of this rule, and also that no court of final resort should lightly consider this important rule, or be quick to change its long established and settled rules of law.

This is all true, speaking generally, but the rule of *stare decisis* gains most of its importance in being a rule of property and human conduct. In fact, these

are the only justifications for its application when conditions have changed which make it expedient or desirable that a given rule should be changed, qualified or abrogated.

Ship owners are entitled to the good offices of the Admiralty court to settle their differences with shipbuilders. This court is a court better qualified to hear and determine them than a common law court. In every case of that kind it requires technical knowledge of the subject. This is usually possessed by judges in courts of admiralty, and in any case this knowledge is much more readily acquired, than by a jury of even average intelligence and information.

As to the rule of *stare decisis,* we desire to refer to the language of Chief Justice Taney in the case of *The Genessee Chief,* 12 How., 443, at page 456, in which he speaks of the case of *The Thomas Jefferson:*

> "It is the decision in the case of *The Thomas Jefferson* which mainly embarrasses the court in the present inquiry. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen, and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day" (page 458):
>
> "The case of *The Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt our-

selves bound to follow it, notwithstanding the opinion we have expressed. For everyone would suppose that after the decision of this court, in a matter of that kind, he might safely enter into contracts, upon the faith that rights, thus acquired, would not be disturbed. In such a case *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. For if the law, as pronounced by the court, ought not to stand, it is in the power of legislature to amend it, without impairing rights acquired under it. But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we now give can disturb no rights of property, nor interfere with any contracts heretofore made. The rights of property and of parties will be the same by whatever court the law is administered. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must product serious public as well as private inconvenience and loss, it becomes our duty not to perpetuate it."

We have shown what the law of England now is, and that it embraces contracts of building a ship among those within the jurisdiction of the admiralty, and we will now take up its Vice Admiralty Courts and we find in them and the Consular Courts full and complete jurisdiction in admiralty of the building contract.

BRITISH COLONIAL (Vice-Admiralty Courts).

The British Vice-Admiralty Courts have jurisdiction over "all claims in respect of the *building*, equipping or repairing" of vessels.

See Vice-Admiralty Courts Act (1863), c. 24, Schedule A. and S., 10. To show how wide a field

this jurisdiction obtains in, a list of these Vice-Admiralty Courts follows:

Antiqua — Jurisdiction given by Vice-Admr. Courts Act (1863), c. 24, Sched. A. & S., 10.

Bahames—Same.
Barbados—Same.
British Columbia—Same.
British Honduras—Same.
Cape of Good Hope—Same.
Ceylon—Same.
Dominica—Same.
Falkland Ids.—Same.
Gambia River—Same.
Gibraltar—Same.
Grenada—Same.
Hong Kong—Same.
Jamaica—Same.
Labuan—Same.
Malta—Same.
Montserrat—Same.
Natal—Same.
Nevis—Same.
N. Brunswick—Same.
Newfoundland—Same.
N. S. Wales—Same.
N. Zealand—Same.
Nova Scotia—Same.
Prince Edward Island—Same.
Queensland—Same.
St. Christopher—Same.
St. Helena—Same.
St. Lucia—Same.
St. Vincent—Same.
Sierra Leone—Same.

South Australia—Same.

Tasmania—Same.

Tobago—Same.

Trinidad—Same.

Van Couver's Island—Same.

Victoria (colony)—Same.

Virgin Islands—Same.

West Australia—Same.

Bermuda — Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); and also by Bermuda Act No. 8 of 1862, S. 1.

Guiana (British) — Jurisdiction given by Vice-Admr. Act C. 24 (1863); also by Order No. 4 of 1860; also by Letters Patent of May, 1860.

Fiji (colony) — Jurisdiction given by Order in Council of 26 Oct., 1875.

Gold Coast—Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Order in Council of July 31, 1880.

Lagos—Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Order in Council of July 31, 1880.

Quebec—Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Consolidated Statutes, pp. 662-667.

Maritius — Jurisdiction given by Vice-Admr. Courts Act C. 24 (1863); also by Order in Council of 23 Oct., 1851.

Straits Settlement—Jurisdiction given by Vice-Admr. Courts Act (1863) C. 24; Vice-Admr. Courts Act (1867) C. 45:

West Pacific Islands—See "Fiji Gazette," March 7, 1884 (official order).

Ontario — Jurisdiction given by "Jurisdiction

Acts" (1877) C. 21; "Jurisdiction Acts" (1879) C. 40; "Jurisdiction Acts" (1882) C. 34.

Consular Courts (British).

The British Consular Courts were given admiralty jurisdiction as indicated below—and this admiralty jurisdiction includes "claims in respect of the *building*, equipping or repairing" of vessels.

H. M. Supreme Court for China, Japan and Korea—Jurisdiction given by (1) Rules of procedure in admiralty in the Supreme Court, of June 5, 1867, approved by Her Majesty's Minister of Foreign Affairs in Dispatch No. 8 of Sept. 9, 1867; (2) by 26 & 27 Vict. C. 24; (3) China and Japan Order in Council of March 9, 1865, Act 54; (4) see also 14 Hertslets' Treaties, p. 246.

Contantinople (Ottoman Dominion)—By Order in Council of Dec. 12, 1873, No. 88.

Egypt—Same.

The Levant—See 7 L. T. N. S., 164.

We will now take up in alphabetical order the codes of nearly all the maritime nations (at least those we have had access to) and we find without exception the contract to build is held to be a maritime contract.

Austria.

Austria has a Tribunal of Commerce, corresponding to the English Admiralty Courts, distinct from the ordinary Civil Tribunals. And while Austria has no written maritime law, it recognizes the maritime usages and laws of the Consolat de la Mer (which see), Chapter 32.

See Pardessus' Collection Lois Maritimes (Aus-

tria), and now uses the second book of the Italienne Code of Commerce (1883).

Matternich Lois d'Autriche, 102.

(See under the head of Italy.)

Belgium.

Belgium gives admiralty jurisdiction over contracts to *build* a ship.

See New Mar. Code (1880), Art. 4 (10-11); Journal de Droit Inter. Prive. (1878), p. 511.

The Belgium maritime law is based on the laws of the Hansa Towns (*Hanseatic Ordinances*), which expressly make *contracts* to *build* maritime, Arts. 1, 2, 3, 4, 5.

Brazil.

Brazil gives jurisdiction to admiralty in all suits involving *contracts* to *build* a vessel.

See Codigo Commercial do Imperio do Bresil (1850), Part II; also Decrees Nos. 737-738 of 1850; also Decree No. 1597 of 1855.

Denmark.

In Denmark the admiralty has, from the earliest times, had jurisdiction over contracts to *build*. Their maritime law is based on the laws of (1) Wisbuy; (2) Hanseatic Ordinances; (3) the 4th Book of Christian V. (April 15, 1683).

See (1) Pardessus Collection des Lois Maritimes, Vol. III, p. 265; (2) Horesteren, Advokat Klubein, Copenhagen (translated by Dr. Wendt, London).

The new maritime code of Denmark (1892) adopts these old laws almost *in toto* (in concert with

Sweden and Norway), giving admiralty jurisdiction over "the *building,* repairing, purchase and sale of ships."

See English translation of the maritime code of Denmark by Schmidt in Parliamentary Paper, Foreign Office, Miscellaneous Series (1892), No. 240.

France.

The French admiralty jurisdiction extends to "the *building,* fitting, providing, manning and sale of ships." The maritime law of France is based on (1) the laws of Oleron (Roll d'Oleron); (2) Il consolato del Mare (Chap. 32); (3) Marine Ordinance of 1691 (Valin), Tit. 2, Art. 1.

See Pardessus' Collection des Lois Maritime; Bean's Code Maritime, introduction, p. 81, *et passim.*

The modern Code of Commerce expressly gives admiralty jurisdiction over contracts to *build.*

See Code of Commerce, Art. 191; Code of Commerce, Art. 633.

In 1833 one M. Warkong discovered a manuscript in the library at Bruges, containing the ancient maritime law of Damme, the acknowledged source of the maritime law of Holland, North Germany, Sweden and Denmark, which proves the French origin of these laws, thereby substantiating the contention of Pardessus in his great work.

Germany.

There are no specific courts of admiralty in Germany, except Marine Courts along the coast to inquire into maritime *casualties.* All other admiralty matters are subject to the jurisdiction of ordinary civil courts.

Pardessus speaks of ancient admiralty jurisdiction in the North German States, in accordance with the laws of *Wisbuy* (based on Oleron) and the laws of the Hansa *Towns.*

Greece.

The French Code of Commerce was adopted by Greece in 1835.

See Raikes' translation of Greek Code.

Holland.

At the present day there are no distinct Admiralty Courts in Holland, nor is there any special jurisdiction in cases of maritime law.

> Vanderlinden's Manual of Law and Practice of Holland, p. 249 (Juta's translation).

But Pardessus gives Holland a specific admiralty law prior to 1700, based on the laws of the Hansa Towns, and (2) Mar. Cont., Holland Code, Art. 313.

See Pardessus (subject of Holland).

Italy.

The maritime law of Italy is based on *Il Consolata del Mare,* which gives admiralty jurisdiction over contracts to *build* (Chap. 32).

See *Codice per la Marina Mercantile,* 1877 (Revised 1883).

And the modern maritime law of Italy expressly gives admiralty such jurisdiction.

See Code of Commerce, Book IV, Title 1, Chap. 1, Art. 869; Code of Commerce, Book IV, Title 1, Chap. 2, Art. 879.

And this jurisdiction is reiterated by royal decree, giving to the admiralty jurisdiction of "all contracts for *building,* acquiring or hiring a ship or *part* of a ship."

See Legge Transitoria Commerciale (Provisional Dispositions enacted by Royal Decree of Dec. 14, 1882, for the execution of the Commercial Code), Art. 13.

And again, by another order giving admiralty jurisdiction of "declarations and contracts for *building,* acquiring or hiring of ships."

See Order (Regolamento) for carrying out the Code of Commerce, Title 5, Art. 68; also "Specifications (dichiaraziono) and contracts for the *building,* ownership or leasing of vessels."

See order for carrying out the Code of Commerce, Title 5, Art. 70.

MEXICO.

Here the contract is also held to be maritime.

NORWAY.

The maritime law of Norway is based on the laws of the Hansa Towns, and there is an express jurisdiction in the admiralty over "contracts for *construction* of ships" and over "lawsuits respecting the building and manning of ships."

See (1) Laws of Navigation of 1860, Chap. 1; (2) Norwegian Maritime Code (adopted 1894, copying the exact code of Sweden), Chap. 1, Art. 3.

PORTUGAL.

The maritime law of Portugal is modeled on the French system, and gives admiralty jurisdiction as

to "contracts, in writing, for the *construction* of ships."

See Portuguese Commercial Code, Art. 1300.

"Contracts to *build* ships" are "maritime contracts."

Code of Commerce (1889), Book III (Maritime Trade), Title 1, Chap. 1, Art. 578 (par. 12).

Same

Code of Commerce, Book III, Title 1, Chap. 1, Art. 587.

Code of Commerce, Book III, Title 1, Chap. 1, Art. 590.

RUSSIA.

In Russia, admiralty jurisdiction extends to "*contracts relating to* the *construction,* purchase, refitting and freighting of ships."

See (1) Russia Code (Marine), Art. 1-3; (2) International Commercial Law, by Leone Levi, Vol. 1, p. 9.

SPAIN.

The Spanish Code of Civil Procedure, 1881, assigns a portion of the maritime jurisdiction especially to the judges of the first instance (juzgoch de primera instansia). This extends to "*materials* supplied for *building.*"

Code of Commerce, Art. 580, Par. 8.

Code of Civil Procedure, Art. 992; also Art. 1544 (Spanish Maritime Law, founded on *Consolat de la Mer*).

SWEDEN.

Swedish maritime law is founded on the laws of Wisbuy, and the maritime jurisdiction extends to "the *building* or commanding of a vessel."

See Marine Law of Feb. 23, 1864, Sec. 302. The present (new) code gives the same jurisdiction. (Sweden, Denmark and Norway all adopting the same code in 1891, 1892, 1894 respectively.)

See Swedish Maritime Code, Chap. 1, Art. 3.

English translation by Inglis in Parliamentary Papers, Foreign Office (1892), Miscellaneous Series, No. 240.

TUNIS.

Tunis has adopted the French maritime code *in toto*.

Raikes Admr. Ins.

All of the principal maritime nations of the world say the contract is maritime, and every step in the direction of unification of the laws of all countries is a step in the direction of progress in civilization.

The Maritime Law Association of the United States has been for years interested with similar associations of the principal maritime nations in bringing about as near as may be the unification of laws to govern ships and maritime affairs. Ships are rovers and are as much in foreign ports as in those of their flag. Uniformity in laws, therefore, is extremely convenient and desirable.

Conclusion.

The contract being maritime, it follows that the Admiralty Courts had jurisdiction to enforce any proper lien which the complainants had, and therefore the State Courts had no jurisdiction. For the foregoing reasons, therefore, the decision of the Supreme Court of Michigan should be reversed.

Respectfully submitted.

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